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NORTH CAROLINA REPORTS.

VOL. LXXXVIII.

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA.

[v. 88]

FEBRUARY TERM, 1883.

REPORTED BY

THOMAS S. KENAN.

(VOL. 13.)

RALEIGH:
ASHE & GATLING, STATE PRINTERS AND BINDERS.
PRESSES OF UZZELL & GATLING.
1883.

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JUSTICES OF THE SUPREME COURT,

February Term, 1883.

CHIEF JUSTICE:

WILLIAM N. H. SMITH.

ASSOCIATE JUSTICES:

THOMAS S. ASHE. THOMAS RUFFIN.

CLERK OF THE SUPREME COURT.....WILLIAM H. BAGLEY.
MARSHAL OF THE SUPREME COURT.....ROBT. H. BRADLEY.

ATTORNEY-GENERAL:

THOMAS S. KENAN.

108060

Judges of the Superior Courts.

James E. Shepherd,	1st Dist.	John A. Gilmer,	5th Dist.
Frederick Philips,	2d "	Wm. M. Shipp,	6th "
Allmand A. McKoy,	3d "	Jesse F. Graves,	7th "
James C. MacRae,	4th "	Alphonso C. Avery,	8th "

James C. L. Gudger, 9th Dist.

SOLICITORS:

John H. Blount,	1st Dist.	F. N. Strudwick,	5th Dist.
John H. Collins,	2d "	Frank I. Osborne,	6th "
Swift Galloway,	3d "	Joseph Dobson,	7th "
James D. McIver,	4th "	Joseph S. Adams,	8th "

Garland S. Ferguson, 9th Dist.

Judge of the Criminal Court.

Oliver P. Meares.....Wilmington.

SOLICITOR:

Benjamin R. Moore.....Wilmington.

LICENSED ATTORNEYS,

February Term, 1883.

ROBERT B. ALBERTSON,
LEWIS S. BENBOW,
CECIL G. BUTT,
ROBERT L. CAIN,
ROGER A. P. COOLEY,
FLETCHER R. DEARMIN,
JOHN H. DILLARD, JR.,
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JOHN F. REYNOLDS,
JAMES B. SCHULKEN,
BENJAMIN C. SHARPE,
FRANK S. SPRUILL,
DAVID L. WARD,
ROBERT W. WINBORNE.

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Martin v. *Hughes*, 67 N. C., 293, in *Wharton* v. *Taylor*, 230; *State* v. *Norris*, 1 Hay., 495, in *State* v. *Taylor*, 694.

CASES

ARGUED AND DETERMINED IN

THE SUPREME COURT

OF

NORTH CAROLINA,

AT RALEIGH.

FEBRUARY TERM, 1883.

COMMISSIONERS OF BEAUFORT v. F. J. SATCHWELL and others.

Appeal.

The court will not entertain appeals brought up in a fragmentary manner. (*Hines* v. *Hines*, 84 N. C., 122, cited and approved).

CIVIL ACTION tried at Fall Term, 1882, of BEAUFORT Superior Court, before *Gilliam, J.*

Defendants appealed.

No counsel for plaintiffs.

Mr. Geo. H. Brown, Jr., for defendants.

ASHE, J. This purports to be a civil action brought against the defendant and the sureties on his official bond (as sheriff) for a breach thereof, in not paying over to the county treasurer certain taxes alleged to have been collected by him.

It is an anomalous case. The original transcript sent to this

court contains nothing but two summonses and a case agreed, and for aught that appears there never was any service of the summons upon any of the numerous parties; nor was any acknowledged by them; nor that the summonses were ever even in the hands of the sheriff; and a second transcript, intended to supply the deficiencies of the first, contains only the complaint and an order of reference. There is no answer, no appearance of the defendants, nor any report of the referee.

In the case agreed, His Honor, who heard the case, states: "This is a civil action brought by plaintiff upon the official bond of F. J. Satchwell, late sheriff of Beaufort county, for the balance of taxes due and unpaid by him for the year 1878. *The other issues and controversies arising in the matter are probably arranged except this.*" There are then other issues and controversies involved in the case, and this one is elicited from the others and made the subject of the appeal; in other words, a part of the case is brought by the appeal to this court, while another part remains below.

This court has emphatically announced that it will not entertain appeals brought up in this fragmentary manner. *Hines* v. *Hines*, 84 N. C., 122. In that case the court took occasion to say, and the remarks apply as well to this case:

"The parties should have gone on regularly to trial of the case upon all the issues raised by the pleadings, according to the regular practice of the court, and if the court should have erred in its judgment or any of its rulings, then to have brought the whole case before this court by appeal, that its decision upon the questions of law involved and controverted might be finally adjudicated."

Aside from this objection, the record transmitted to this court is too imperfect. If such a proceeding should receive the sanction of the court, all parties would have to do, would be simply to state their names in adverse position upon the record—A. B. *v.* C. D.—then file with the clerk of the court a statement of the facts agreed upon, and demand judgment. To support such a

proceeding would be giving sanction to a looseness in practice that would do violence even to the liberal spirit of the Code.

This appeal cannot be entertained. It must be dismissed.

PER CURIAM. Appeal dismissed.

Z. F. LONG, Sheriff, v. JOHN A. McLEAN and another.

Arrest and Bail.

The provision of the constitution (Art. I, § 16) prohibiting "imprisonment for debt, except in cases of fraud," has no application to actions for tort; it is confined to causes of action arising *ex contractu*.

(*Moore* v. *Green*, 73 N. C., 394, cited and approved).

MOTION to vacate an order of arrest heard at Fall Term, 1881, of RICHMOND Superior Court, before *Graves, J.*

The action is brought against the defendants, McLean & Leach, partners in trade, and the plaintiff alleges that certain executions were delivered to him, as sheriff, which he levied upon several hundred pounds of seed cotton, as the property of the judgment debtor, and took the same into his possession; that after the levy, the defendants wrongfully and unlawfully took a portion of said cotton and converted it to their use, and that he believes the defendants have disposed of the same, whereby he has sustained a loss of four hundred dollars.

These are the facts set out in the plaintiff's affidavit, and upon which the order of arrest was made. The motion to vacate the order being refused, the defendant appealed.

Messrs. J. D. Shaw and *McNeill & McNeill*, for plaintiff.

Messrs. Burwell, Walker & Tillett and *Rowland & McLean*, for defendant.

RUFFIN, J. The summons in this case was served upon the defendant, Leach, alone. The action is for the wrongful conversion of personal property. Accompanying the summons was an order of arrest, under which the defendant was held to bail. At the return term, he moved to vacate the order upon the ground that the affidavit, on which it was based, failed to allege fraud, on the part of the defendant, in taking the goods; and upon his motion being overruled, he appealed to this court.

The fallacy of the defendant's argument is in supposing that the provision of the constitution, which prohibits "imprisonment for debt, except in cases of fraud," has any application to actions for *tort*. In *Moore* v. *Green*, 73 N. C., 394, the whole ground was gone over and thoroughly discussed, and it was solemnly resolved that the prohibition—and indeed the provisions of the entire section—was intended to apply only to causes of action arising *ex contractu*. To give it any other construction, it was said, would be to withdraw a wholesome check on violence and wrong, and would tend to license disorders and law-breaking, incompatible with the peace and welfare of society.

We can add nothing to what is there said, except to call attention to the fact, that similar provisions in the constitutions of other states have received a like construction. *Harris* v. *Bridgers*, 57 Ga., 407; *McCook* v. *State*, 23 Ind., 127; *Lathrop* v. *Singer*, 39 Barb. (N. Y.), 396; *People* v. *Cotten*, 14 Ill., 414.

No error. Affirmed.

P. C. WILSON v. THE LOUIS COOK MANUFACTURING COMPANY.

Attachment Proceedings.

1. An attachment may be had in support of any demand arising *ex contractu*, the amount of which is ascertained or is susceptible of being ascertained by some certain standard referable to the contract itself, but otherwise, where the claim is for purely uncertain damages; *Therefore*, where the plaintiff sought to recover compensation for the loss of profits, alleged to have resulted from the failure of defendant to furnish certain goods which the plaintiff was to sell as his agent; *Held*, that an attachment would not lie.
2. A motion to dissolve an order of attachment may be made before the return term of the summons in the action.

(*Price* v. *Cox*, 83 N. C., 261; *Palmer* v. *Bosher*, 71 N. C., 291, cited and approved).

MOTION to vacate an order of attachment, made in an action pending in MECKLENBURG Superior Court, heard at Chambers on the 31st of January, 1883, before *Shipp, J.*

His Honor vacated the order upon the ground that the affidavit does not state a cause of action authorizing an attachment, and the plaintiff appealed.

Messrs. Burwell & Walker, for plaintiff.
Messrs. Jones & Johnston, for defendant.

RUFFIN, J. The appeal in this case is taken from an order made at Chambers vacating an attachment hitherto issued by the clerk.

In his affidavit, filed in support of his application for the attachment, the plaintiff sets forth his demand as having arisen "upon a contract which the defendant made with him, to furnish him with buggies of defendant's make, of which he was to have the exclusive sale in the city of Charlotte," which contract, he alleges, the defendant failed to perform and thereby became "indebted to him in the sum of one thousand dollars, as nearly

as he can ascertain the same." The reason assigned by the plaintiff—in which he was sustained by His Honor—for vacating the warrant of attachment was, that the action is brought for unliquidated damages, too uncertain in amount to be the subject of an attachment under the provisions of section 197 of the Code.

The law as regards this matter has been recently and fully considered in *Price* v. *Cox*, 83 N. C., 261, and as it is impossible to distinguish the two cases in principle, the conclusion then reached must control us now. The rule to be deduced from that case is, that an attachment may be had in support of any demand arising *ex contractu*, the amount of which is ascertained or is susceptible of being ascertained by some standard, referable to the contract itself, sufficiently certain to enable the plaintiff to aver it in his affidavit, or a jury to find it; but not so, if the action be one for unliquidated damages, in which the contract alleged furnishes no rule for ascertaining them, but leaves the amount to remain altogether uncertain until fixed by the jury, without any definite rule of law to direct them.

The plaintiff in this action seeks to recover compensation for the loss of such profits, as he conjectures he might have derived from selling buggies as agent for the defendant, had they been furnished him according to the terms of the contract. It is therefore a case of purely uncertain damages, with no standard furnished by the contract itself, or fixed rule of law, for ascertaining them, and it is impossible to suppose a case farther removed from the provisions of the statute than it is.

In *Lawton* v. *Keil*, 51 Barb. (N. Y.), 30, cited by counsel, the facts were that the defendant contracted to buy sound corn, but bought indifferent corn for the plaintiff. The standard of damages was said to be the difference in the quality and market values of the two kinds of corn; and as nothing was wanting but for the jury to ascertain that difference, it was held that the plaintiff was entitled to have an attachment under the maxim *id certum est quod certum reddi potest;* and it was so held too,

under somewhat similar circumstances in *Carland* v. *Cunningham*, 37 Penn. St. Rep., 228. But these cases bear no sort of analogy to the one before us, and indeed by referring to the opinions of the judges as delivered in them, they will be found to be in perfect harmony with the decision in *Price* v. *Cox*.

Nor is there any greater force in the suggestion that the motion to dissolve the attachment was prematurely made, or that it could only be made after the return of the summons, and after the defendant had appeared in the action. The very point was considered in *Palmer* v. *Bosher*, 71 N. C., 291, where it was held that the defendant need not wait until the return term of the court, but might voluntarily appear at any time and move the judge to vacate the attachment—the court remarking upon the hardship it might inflict upon a defendant, whose property had been seized under an irregular process, if he were compelled to postpone, perhaps for six months, a motion to vacate it.

We see no error in the judgment of the court below, and the same is therefore affirmed, and it must be certified to that court that we are of the opinion that the warrant of attachment was improperly issued in this case and that the same should be quashed.

No error. Affirmed.

L. J. WALKER v. H. B. WILLIAMS and wife.

Appeal Bond—Surety—Party to Suit need not Sign.

An undertaking that the appellant shall pay all costs that may be awarded against him on an appeal from a justice's court, and that if the judgment or any part thereof be affirmed, or the appeal dismissed, the appellant shall pay the amount directed to be paid by the judgment, is in compliance with the statute, and does not restrict the obligation to pay the judgment (if

affirmed) as rendered in the justice's court, but the signers are bound to pay such as may be rendered in the superior court against the appellant. It is not necessary, to bind the appellant party to the suit, that he should sign the undertaking.

MOTION heard at Spring Term, 1883, of MECKLENBURG Superior Court, before *MacRae, J.*

This was a motion for judgment and execution against the defendants upon an appeal bond. Motion allowed and defendants appealed.

Messrs. Jones & Johnston, for plaintiff.
Mr. Platt D. Walker, for defendants.

ASHE, J. The plaintiff, on January 1st, 1881, recovered judgment before a justice of the peace for the sum of ninety-nine dollars and some cents, including interest and costs, when the defendants appealed to the superior court and entered into an undertaking upon appeal with John W. Miller as surety, according to the requirements of Battle's Revisal, ch. 63, § 63, as amended by the act of 1879, ch. 68.

It appearing from the notice of appeal, filed with the justice, that the grounds of the appeal were that the contract, which was the subject matter of the action, was not made by the authority of S. E. Williams, the *feme* defendant, nor for her benefit, and that she was a married woman, having separate estate, the plaintiff's counsel entered a *nolle prosequi* as to her; and the defendants' counsel having stated that he had no objection to a judgment against H. B. Williams, a verdict and judgment were given against him; and thereupon the plaintiff's counsel moved for judgment against the said H. B. Williams and John W. Miller, his surety to the undertaking on appeal, and judgment was accordingly rendered for the sum of one hundred and twenty-one dollars and fifty cents, of which sum ninety dollars was principal, and costs of action; and that S. E. Williams go without day and recover her costs.

The defendant's counsel excepted to the judgment on the undertaking, on the ground the judgment was not in affirmance of the judgment rendered in the justice's court.

The undertaking was that the appellant shall pay all costs that may be awarded against him on such appeal, and that if the judgment or any part thereof be affirmed, or the appeal be dismissed, the said appellant shall pay the amount directed to be paid by the judgment, or the part of such amount as to which the judgment shall be affirmed, &c.

The undertaking was signed by only one of the defendants. It was not necessary that either of the defendants should sign the bond, as they were parties to the suit; but the appeal was taken by both the defendants, for the undertaking contains the recital, "Whereas, the said defendants do appeal," &c.

The form of the undertaking, we think, is a sufficient compliance with the provisions of the statute. The words used in Battle's Revisal, ch. 63, § 63, are, "if the judgment be rendered against the defendant." It is evident that the signers of the undertaking intended to bind themselves to pay such judgment as might be rendered in the superior court against the appellants, and the words used in the undertaking were not intended to restrict the obligation to pay the judgment only if it should be ultimately affirmed as rendered in the justice's court. Such a construction would be sticking in the bark.

"In the construction of instruments in general, if the meaning can be collected, the court will give effect to the intention of the parties; and words by which the intention of the parties can appear, are held sufficient, however incorrect and ungrammatically expressed, if the meaning be clear. Thus: where a note had the words, 'I promise not to pay,' the court held it to be a promissory note: where the condition of the bond was made void upon certain terms by the words of the condition, the court held they must be taken in the same sense as if the condition had been that the bond itself should be void." Potter's Dwarris on Statutes, 176.

Here, there can be no question that it was the intention of the signers of the undertaking to bind themselves to pay whatever judgment might be rendered in the superior court. "Those judges," said an eminent English judge, "are exceedingly commended, who are curious and almost subtle to invent reasons and means to make acts according to the just intent of the parties." This it has been our purpose to do in construing this undertaking, without making any particular claim to subtlety or astuteness.

There is no error. The judgment of the superior court must be affirmed.

No error. Affirmed.

GEORGE WILLIAMSON v. JOHN H. KERR.

Amercement of Clerk of Superior Court.

A clerk is liable to the penalty of $100 for failure to issue execution on a judgment (rendered upon a debt contracted since May, 1865) within six weeks of its rendition. The convention ordinance of 1866 does not repeal the act of 1850, which provides the remedies for the recovery of such debts, Bat. Rev., ch. 44, § 28. Whether it is repealed as to debts contracted prior to May, 1865—*Quære.*

(*Badham* v. *Jones*, 64 N. C., 655, cited and distinguished).

MOTION to amerce the clerk, heard at Fall Term, 1882, of CASWELL Superior Court, before *Shipp, J.*

At fall term, 1881, the plaintiff obtained judgment *nisi* against the defendant for the penalty of one hundred dollars, for not issuing execution on a judgment theretofore obtained by him in the superior court, in pursuance of the requirements of the act of 1850. Bat. Rev., ch. 44, § 28.

The following are the facts found by His Honor: At fall term, 1880, the plaintiff, with John L. Williamson, obtained judgment, upon a debt contracted since May, 1865, against J. N. and G. O. Williamson; that the defendant clerk issued no execution upon the judgment to spring term, 1881; that execution was issued from spring term, 1881, to fall term, 1881; and that said execution was satisfied by money paid to the sheriff, and by him to the present plaintiff, one week before said fall term.

A notice to show cause, why the judgment *nisi* should not be made absolute, was served upon the defendant, and at fall term, 1882, His Honor gave judgment absolute, and the defendant appealed.

Mr. John W. Graham, for plaintiff.
No counsel for defendant.

ASHE, J. We are of the opinion the defendant, as clerk, is liable to the penalty. Upon what ground we are called upon by the appeal to review the action of the superior court in the premises, is left to surmise. It may be that the defendant supposes that the act of 1850, which requires clerks of the superior courts to issue executions upon all judgments rendered in their respective courts, within six weeks of the rendition of the judgment, was repealed by the 23d section of the convention ordinance of June 23d, 1866, which declares all laws in conflict with its provisions, repealed; and that section 10 of the ordinance, which forbade clerks from issuing executions from spring term, 1867, without permission of court, being in conflict with the act of 1850, repealed the latter act. But section 17 of the ordinance expressly excepted from its provisions "any debts or demands contracted, or penalties incurred, since the first day of May, 1865, or which may be hereafter contracted or incurred, but that the remedies for the recovery of the same shall be in all respects similar to the remedies, for the recovery of debts, which were in

force in the year 1860." And an amercement is a debt. 3 Blk. Com., 161.

But the judgment, upon which the defendant is alleged to have failed to issue execution in the limited time, was founded upon a contract entered into subsequent to the first of May, 1865; and therefore the ordinance and its provisions left it, with its incidents and remedies, untouched.

The act of 1850, then, was not repealed, so far as related to the issuing of execution upon this judgment, and the defendant is liable to the penalty of one hundred dollars, as he would have been in 1860.

It may, however, be supposed that as the ordinance of June, 1866, is repealed by section 7 of the act of February 12th, 1867 (ch. 17), that may affect the question of the defendant's liability to the penalty; but it only repeals so much of the ordinance as comes in conflict with its provisions, together with all other laws coming in conflict with the same; and the act, by its very terms and provisions, has application only to debts contracted prior to the first day of May, 1865. Lest there might be some doubt arising in the construction of the act, the legislature, at the same session, on the first of March, passed another act (ch. 18) explanatory of the first, declaring that none of the provisions of the first act shall be so construed as to apply to any debt or cause of action incurred since the first day of May, 1865, but the jurisdiction of the several courts of the state, in all actions of debt, covenant, assumpsit, or account, upon any contract, demand, or penalty incurred since the first day of May, 1865, or which may hereafter be contracted or incurred, and the remedies thereon, shall be in all respects the same as they were in the year 1860.

Whether the act of 1850 is repealed as to debts contracted prior to the first day of May, 1865, we are not called upon to decide, but we are of the opinion that it is still in force with respect to debts contracted since that date.

The decision in *Badham* v. *Jones*, 64 N. C., 655, which is the only case decided by this court in relation to the construction of

the ordinance of 1866, has no application to this case. That was an old debt, and the motion was to amerce the clerk for not issuing execution upon a judgment from spring term, 1867, when he was expressly enjoined from so doing, without permission of the court, by the 10th section of the ordinance.

There is no error. The judgment of the superior court is affirmed.

No error. Affirmed.

J. B. TREXLER and wife v. A. H. NEWSOM and wife.

Injunction—Motion in the Cause—Practice.

1. An injunction granted before the issuing of the summons in the action is premature.
2. A motion in the cause will not lie where the proceeding shows there were two separate judgments constituting distinct causes of action, as it cannot be seen to which the motion is applicable.

(*Patrick* v. *Joyner*, 63 N. C., 573; *McArthur* v. *McEachin*, 64 N. C., 72; *Hirsh* v. *Whitehead*, 65 N. C., 516, cited and approved).

MOTION to dissolve an injunction, in an action pending in ROWAN Superior Court, heard at Chambers in Lexington on the 15th of March, 1883, before *Graves, J.*

In 1875 the defendants obtained two judgments against the plaintiffs before a justice of the peace, one for the sum of $73.49 and costs, upon a claim assigned to them by J. & D. Trexler, and the other for the sum of $39.45 and costs, upon a claim assigned to them by one Hodge. These judgments the defendants caused to be docketed in the superior court on the 3d day of December, 1871, having first had them revived in the justice's court. Executions have been issued thereon, and under

them the sheriff is threatening to sell certain lands which they say are not subject to be sold, as they are the separate property of the *feme* plaintiff, and thereupon they made application to Judge Gilmer, at Chambers, on the 23d day of February, 1883, for an injunction restraining said sale. Notice issued to the defendants to show cause why the injunction should not be granted, which notice was made returnable before Judge Graves, at Chambers in Lexington, on the 15th day of March following, and in the meantime the defendants were restrained from selling the premises.

At the time the application was made to Judge Gilmer no summons had been issued in the cause, though one was issued and served four days thereafter.

Judge Graves refused the injunction and vacated the restraining order upon the ground that at the date of the first application there was no summons and consequently no action pending between the parties, from which the plaintiffs appealed.

Messrs. McCorkle & Kluttz, for plaintiffs.
Mr. John S. Henderson, for defendants.

RUFFIN, J. Besides the express provision of the statute (C. C. P., § 190) that an injunction can only be granted at the commencement of the action, or sometime thereafter, there are several adjudications directly in point and fully sustaining the ruling of the judge. *Patrick* v. *Joyner*, 63 N. C., 573; *McArthur* v. *McEachin*, 64 N. C., 72; *Hirsh* v. *Whitehead*, 65 N. C., 516.

There are several reasons why we cannot adopt the suggestion of counsel and treat this proceeding as a motion in the cause, and amongst them the insuperable one growing out of the fact that there are two judgments, and therefore two distinct causes pending and but one proceeding, and we cannot tell to which it should be applied.

In the opinion of this court the injunction was properly refused, and the judgment is therefore affirmed.

No Error. Affirmed.

CHARLES W. TAYLOE v. OLD DOMINION STEAMSHIP COMPANY.

Trial—Exceptions must be taken in apt time.

Exceptions taken, after verdict, to issues, to evidence, or to the charge, will not be entertained; and exceptions to the making up the case on appeal cannot be taken here.

CIVIL ACTION tried at Fall Term, 1882, of BEAUFORT Superior Court, before *Gilliam, J.*

This action is prosecuted against the defendant company to recover for losses sustained by reason of negligence and delay in transporting and delivering to the plaintiff at Washington, N. C., certain goods shipped by a connecting line from Baltimore. The goods as described in the bill of lading consisted of Slingluff's dissolved bone, and plaster, 25 bags of each; 25 boxes home fertilizers; and 25 bags of acid phosphate. The articles arrived in due time at the point of destination, and were stored with other freight in the company's warehouse, and so covered up as to have escaped notice, and when the plaintiff enquired for them, as he several times did, he was informed that they had not come. They thus remained several weeks and became depreciated in market value, entailing by their sale the damages claimed in the present suit.

The defendant company resists the recovery upon the ground:

1. That the defendant's agent at Washington (T. H. B. Myers), for the delivery of goods transported by the line of steamers, was also constituted by the plaintiff his agent to receive

and store, subject to his orders, and that by virtue thereof they passed at once on arrival from the custody of the company into the hands of Myers acting in the latter capacity, and were then in law delivered to the plaintiff.

2. That the articles are "*commercial fertilizers*," intended to be sold and used as such, and were imported into the state without the prepayment of the tax required of the plaintiff, and without having on the bags and box the label or stamp directed by law, and in direct violation of the provisions of sections 8 and 9 of the act of March 12th, 1877. Acts 1876–'77, ch. 274.

The only issue, except issues relating to the damages, prepared and submitted to the jury is in these words:

Were the goods sued for delivered, upon their arrival, to T. H. B. Myers as the agent of the plaintiff? and the jury respond thereto in the negative.

It is stated in the case signed and sent up by the judge, that no exceptions were taken to the issues, to the evidence, or to the charge given to the jury, until after the rendition of the verdict. It was then contended by the defendant's counsel before the court that,

1. The evidence taken as true in any of its aspects did not warrant a recovery, because it showed a legal delivery of the goods by the defendant to the plaintiff, and discharged the former from liability; and

2. The contract, founded upon an illegal introduction of the goods, was itself void, and could not be enforced.

Messrs. C. F. Warren and *Geo. H. Brown, Jr.*, for plaintiff.
No counsel for defendant.

SMITH, C. J., after stating the above. Upon these facts it is difficult to find any grounds to sustain the defendant's appeal. The counsel for the company acquiesced by not making any exception at the time when it ought to have been made, if made at all, in all that preceded the finding of the jury, in the framing

of the issues, and in the charge of the court; and it is now too late to complain of this action.

The defence, predicated upon the alleged illegal importation, we must deem to have been abandoned, since no issue in regard to it was submitted or suggested; and, if desired, this should have come from the appellant. Upon the verdict then judgment was properly rendered for the plaintiff, and, no error appearing in the record in reference thereto, must be affirmed.

But it is insisted for the defendant, as is disclosed in the memorandum signed by defendant's counsel assenting to the delivery to the judge of the plaintiff's exceptions to the case made out by appellant as equivalent to service of them upon appellant's counsel, that the exceptions are not in form "specific amendments" as prescribed by the Code, § 301, and ought to have been disregarded, leaving that prepared for appellant to stand and accompany the record.

The exception to the modifications proposed by the appellee for vagueness or other cause, should have been taken before the judge at the time fixed for hearing and passing upon the amendments and preparing the case to be sent up, and not having then been taken, it cannot be entertained here. Our appellate jurisdiction is exercised in correcting errors of law committed in the court below, and in reviewing rulings to which exceptions are there taken.

While unnecessary to examine the appellee's amendments and their liability to the imputation of being too indefinite, we think the two latter, which furnish the materials to supply alleged omissions, are sufficiently specific to meet the substantial requirements of the Code, while the statement of the testimony contained in both cases is essentially similar in presenting the merits of the controversy, and to this the first amendment is confined. But however well founded the appellant's complaint may be of the form of the amendments, it is enough to say they are not properly before us upon the appeal.

It must therefore be declared that there is no error in the record, and the judgment must be affirmed.

No error. Affirmed.

J. D. STILLEY v. H. McCOX.

Judge's Charge.

There is no law which prohibits a judge, in his charge to the jury, from pronouncing a dissertation upon such moral questions as are suggested by the incidents of the trial, provided the language used is without prejudice to either party.

CIVIL ACTION for claim and delivery, tried at Spring Term, 1881, of BEAUFORT Superior Court, before *McKoy, J.*

The plaintiff alleged title to a certain horse, which was in possession of and detained by the defendant. The exception taken by the plaintiff on the trial is to the charge of the judge, which is set out in the opinion of this court. There was a verdict for the defendant, and the plaintiff appealed from the judgment rendered thereon.

Mr. George H. Brown, Jr., for plaintiff.

No counsel for defendant.

ASHE, J. On the trial the question arose whether the contract of the exchange of horses was absolute or conditional, and there was a great deal of conflicting testimony—the plaintiff and some four or five witnesses swearing that the contract was conditional, and the defendant and as many witnesses swearing that the contract was absolute.

In reference to this conflict of testimony, His Honor in charg-

ing the jury used the following language, which is the only ground of exception taken by the plaintiff:

"The question of dollars and cents is of very small moment in this cause, but the greater and momentous question is the character of the men who testify. This case involves more in its consequences than the value of fifty horses. A good character, which a man has established, is the most precious heritage he could leave his children."

We know of no law which prohibits a judge in his charge to the jury from pronouncing a dissertation upon such moral questions as may be suggested by the incidents of a trial, provided it be innocent and work no prejudice to either of the parties.

The remarks of His Honor in this case were certainly not obnoxious to the charge of partiality. They applied equally to both parties, and there was not a word which could have influenced the jury on the one side or the other. The language used by him was no violation of the act of 1796, and there is therefore no error.

No error. Affirmed.

State ex rel. WILLIAM BARBEE and others v. H. WEATHERSPOON and others.

Habeas Corpus.

A party, set at large by writ of *habeas corpus*, upon the ground that the judgment of imprisonment was void for want of jurisdiction in the court, may be again arrested for the same cause upon legal process of a court having jurisdiction—either to try or bind over.

CIVIL ACTION tried at Fall Term, 1881, of WAKE Superior Court, before *Gilmer, J.*

Defendants' demurrer to complaint sustained, and plaintiffs appealed.

Messrs. T. R. Purnell and *W. M. Busbee*, for plaintiffs.
Messrs. Fowle & Snow and *J. C. L. Harris*, for defendants.

RUFFIN, J. This action is brought to recover the penalty of twenty-five hundred dollars, given by the statute to any one who may be imprisoned or detained for a cause, for which he has been once delivered on a *habeas corpus*, and is before us upon an appeal taken from a judgment of the superior court, sustaining a demurrer to the complaint.

The case made by the complaint is as follows: In February, 1880, the *feme* plaintiff was arrested on a warrant and brought before the defendant, Weatherspoon, an acting justice of the peace for Wake county, charged with having aided and abetted one Anna Smith in an attempt to poison one Emma Scott. The justice took final jurisdiction of the matter, and holding the plaintiff to be guilty, sentenced her to an indefinite term of imprisonment.

Application in her behalf was made to Justice ASHE of the supreme court, who caused her to be brought before him by *habeas corpus*, and, declaring her imprisonment to be unlawful, directed her to be discharged therefrom, and accordingly the same was done.

Immediately thereafter the defendant, Barbee, who was also an acting justice in the county, issued another warrant for the plaintiff, wherein she was charged with the same offence as set forth in the former warrant, and directed the same to the defendant, Nowell, as sheriff of the county, who arrested and detained her thereon—this latter arrest being procured by the solicitations of the defendants, Weatherspoon and Scott.

The statute, which is substantially the same with the English act of 31, CHARLES II., provides, "that no person who has been set at large upon a writ of *habeas corpus* shall be imprisoned or detained for the same cause, by any person whatsoever, other than by the legal order or process of the court wherein he shall be bound by recognizance to appear, *or of any other court having*

jurisdiction in the case, under the penalty of two thousand five hundred dollars to the party aggrieved." Bat. Rev., ch. 54, § 29.

According to its express terms, then, a party once discharged may be again arrested and imprisoned for the same cause, provided it be done by the legal order or process of a court of competent jurisdiction. The sufficiency in form of the second warrant, under which the plaintiff was arrested, was not disputed in the argument; and as it is clear that the justice, who issued and acted upon it, possessed the full jurisdiction of a committing magistrate, and undertook to exert no other, it would seem, there could be no ground upon which to question the correctness of the ruling in the court below upon the demurrer.

In *Yates* v. *Lansing*, 5 Johns., 282, the action was for a similar penalty under the statute of New York, the language of which is almost identical with our own, and to illustrate its meaning, Chief-Justice KENT puts what he calls a "plain case" of a person, who, upon being committed at a court of sessions of the peace, was discharged by a judge on *habeas corpus*, on the ground that the order of commitment was invalid; and he asks, whether in such case there could be any doubt that the court might cause him to be recommitted upon another and a better warrant.

In *ex-parte Milburn*, 9 Peters, 704, the supreme court of the United States held that a discharge upon a *habeas corpus*, upon the ground of the illegality of the process, under which he was imprisoned, did not protect a party from arrest under other process for the same offence.

It is true that in both the cases referred to, the courts which issued the process were courts of record, but no good reason can be perceived, why this circumstance should make a difference, since, within his sphere, the jurisdiction of the justice is as complete as was that of the courts. If, after the plaintiff's discharge upon the writ of *habeas corpus*, any court was competent to try and punish her for the offence charged, it must of neces-

sity follow, that the justice, as a committing magistrate, had the authority, upon proper information lodged with him, to arrest and hold her to bail for her appearance at that court.

The effect of the order of discharge, as made by Justice ASHE, was merely to declare void the judgment under which the plaintiff was then imprisoned, because of the want of jurisdiction on the part of the justice who rendered it, leaving wholly undecided the question of her guilt or innocence; and to so construe the statute as to protect her from another arrest, on account of the grave crime alleged against her, would be to convert the writ of *habeas corpus*, favored because it is a writ of liberty, into a shield and covering for crime.

The conclusion of the court therefore is, that the complaint failed to set forth a good cause of action against the defendants, and that the demurrer thereto was rightly sustained.

No error. Affirmed.

M. C. KING, Trustee, &c., v. H. T. FARMER and others.

Pleading—Joinder of several causes of Action.

A complaint containing several causes of action, which constitute a series of transactions connected together and forming one course of dealing, is not demurrable; and where different causes of action are of the same character and between the same parties litigant, and the joinder thereof is convenient to them, the court will usually refuse to entertain an objection to the joinder. (*Bedsole* v. *Monroe*, 5 Ire. Eq., 313; *Young* v. *Young*, 81 N. C., 91, cited and approved).

CIVIL ACTION tried upon complaint and demurrer at Fall Term, 1882, of HENDERSON Superior Court, before *Shepherd, J.*

The complaint alleges that the plaintiffs, Mitchel C. King, Andrew Johnstone, the defendant Farmer, and others, on the

29th day of September, 1847, formed and entered into an association, or joint stock company, for the purpose of establishing a hotel in the county of Henderson, and with that view to purchase a tract of land in said county, as a suitable site for said hotel, and for the convenience of the same; and that the said hotel when erected should be under the charge of the said Farmer, at a moderate rent, so long as may be agreed to by the shareholders in the said joint stock company, and that in the meantime he should have the privilege of buying the same from them on payment to them of their respective shares.

In pursuance of this agreement, the requisite amount was raised by subscription among them, to be held at $100 per share, in proportion to the amount subscribed and paid in by each. The tract of land in controversy was purchased, and a deed executed, by the agreement of said shareholders, to the plaintiffs, Mitchel C. King and Andrew Johnstone, in trust for the said shareholders, upon which a costly hotel was erected; and the defendant, Farmer, under the original agreement, took possession of the same, as lessee of the shareholders, and has continued to hold the possession thereof ever since, receiving the rents and profits and appropriating them to his own use.

That after the said lease, in pursuance of the provisions in the original agreement, to-wit: on or about the 15th day of October, 1853, the parties to said agreement and the defendant, Aikin, who was admitted as a shareholder in a meeting duly organized, the defendant, Farmer, being present and participating therein, contracted to sell the said property to Farmer at the price of $13,500 (less $1,608, the amount of subscriptions, advancements and expenditures theretofore made by Farmer), to be paid for in several installments within three years from date of sale, with interest from date, the title to be retained until the whole amount of the purchase money should be paid.

That Farmer paid the first installment of $3,000, and has paid various sums to different shareholders, or their assignees or representatives, and, as he alleges, has purchased the interest of

some of the shareholders, but there is still a very large amount of the purchase money and rents due from Farmer, which the plaintiffs are unable to ascertain.

That Andrew Johnstone, one of the shareholders and co-trustee with the plaintiff, is dead, and his legal and personal representatives are parties plaintiffs, and the defendants are the original shareholders, and the heirs and personal representatives of such of them as have died.

The prayer of the complaint is:

1. For an adjudication of the rights and interests of the parties, plaintiffs and defendants, in the premises.

2. That an account be taken of the amount of the purchase money yet due from the said Farmer, and to whom the same should be paid.

3. For an account of the value of the rents and profits of the land and premises while held by Farmer, as lessee, what amount thereof he may have paid, and to whom.

4. That Farmer may be adjudged to pay the balance due on the purchase money, when the same shall be ascertained, and for a distribution of the same according to the rights of the parties entitled to the same.

5. That, in the event it shall be found impossible to collect the balance of the purchase money from Farmer, the land and premises be sold, and the proceeds distributed.

6 and 7. That the trust be administered and closed, and the trustees discharged from further liability, and for further relief, &c.

The defendant, Farmer, demurred to the complaint, and assigned as causes:

1. That the other defendants, who were interested as shareholders, were improperly joined with him in respect of the action for a specific performance of the contract.

2. That there is a misjoinder of causes of action, in that the cause of action for a specific performance of the contract for the purchase of the land is united with a cause for the rents and profits of the same land, and also with a cause of action against

said Farmer and the other defendants, for a settlement of the affairs of the joint stock company between said Farmer and the other parties named in the complaint.

The demurrer was overruled and the defendants appealed.

Mr. Armistead Jones, for plaintiffs.
Mr. J. H. Merrimon, for defendants.

ASHE, J. The first cause of demurrer assigned, is, to the misjoinder of parties, in that, some of the parties having a common interest with the plaintiffs in the several causes of action united in the complaint, are joined with the defendant, Farmer, in the cause of action for the purchase money, or specific performance. If this were the only cause of action the objection would be tenable; but the several causes of actions are such as (will be hereinafter shown) may be and should be united, not only under the provisions of the Code, but according to the practice in former equity proceedings.

The complainants allege that the defendant, Farmer, has made payments to different members of the shareholders, but to whom, and what amounts, they have no means of ascertaining without an account; and they pray for a settlement of the trust and partnership concern, and for the distribution of whatever balance may be ascertained, which necessarily involves the taking of an account.

In these respects, the defendants joined with Farmer, as defendants, are given their proper position in the action. Their interest to be sure is in common with the plaintiffs, but it is not concurrent, and so far as they may have received parts of the rents and purchase money, and are therefore liable to account, it is to some extent adverse.

As to the cause assigned for misjoinder of causes of action: Section 126 of the Code provides that the plaintiff may unite in the same complaint several causes of action, whether they be

such as have been heretofore denominated legal or equitable, or both, when they all arise out of the same transaction, or transactions connected with the same subject of action; and sub-division 7 of the section requires that the causes of action "must affect all the parties to the action."

It was evidently the purpose of the legislature, in enacting this section, to prevent a multiplication of actions, by uniting in the same action different causes of action, where they might be joined, without subjecting defendants to the trouble and expense of making different and distinct defences to the same action.

No general rule has been or can be adopted with regard to multifariousness. It is most usually a question of convenience, in deciding which, the courts consider the nature of the causes united, and if they are of so different and dissimilar a character as to put the defendants to great and useless expense, they will not permit them to be litigated in the same record; but where the different causes of action are of the same character and between the same parties, plaintiff and defendant, and none other, and no additional expense or trouble will be incurred by the joinder of the several causes, the courts in the exercise of a sound discretion, on the ground of convenience, usually refuse to entertain an objection to the joinder.

"The principle on this subject," says Judge STORY, "seems to be, that where there is a common liability and a common interest, a common liability on the defendants and a common interest in the plaintiffs, different claims to property, at least if the subjects are such as may without inconvenience be joined, may be united in the same suit." Story's Eq. Pleading, § 533.

In *Bedsole* v. *Monroe*, 5 Ired. Eq., 313, Chief-Justice RUFFIN announces the doctrine to be, that "if the grounds of the bill be not entirely distinct and wholly unconnected, if they arise out of one and the same transaction, or series of transactions, forming one course of dealing, and all tending to one end; if one unconnected story can be told of the whole, the objection cannot

apply"; and this principle was cited and approved in the more recent case of *Young* v. *Young*, 81 N. C., 91.

In our case the agreement between the parties to form a joint stock company to build a hotel—to purchase land for its site—the fact of purchase—the erection of the hotel—the lease first, and then the sale to Farmer—all constituted a series of transactions connected together, and forming one course of dealing. The plaintiffs and the defendants, other than Farmer, have a common interest in each and every cause of action, and there is a liability on the defendant, Farmer, to each of the other parties to the action for the balance of the purchase money and rents and profits, in proportion to their respective interests. These causes of action, according to the principles above announced, may be united; and if so, it follows as a legal corollary that the accounts, as prayed for in the complaint, must be taken to ascertain the balances and the amounts due to each of the parties.

There is no error. The demurrer is overruled and the cause remanded to the superior court of Henderson county, that it may be proceeded with according to law.

No error. Affirmed.

RICHARD HILL v. J. A. BUXTON and others.

Pleading—Trespass and Trover—Judge's Charge.

1. A complaint alleging that defendant seized plaintiff's goods and appropriated them to his own use, charges both a trespass and conversion, and constitutes a cause of action under the present system of procedure.

2. Where, in such case, the judge charged that if the jury should find that the property was taken from the *possession* of the plaintiff by force and against his will, he would be entitled to recover some damage, although he had no title; *Held*, no error.

(*Boyce* v. *Williams*, 84 N. C., 275; *Oates* v. *Kendall*, 67 N. C., 241; *Jones* v. *Mial*, 82 N. C., 252; *Parsley* v. *Nicholson*, 65 N. C., 207, cited and approved).

HILL *v.* BUXTON.

CIVIL ACTION tried at January Special Term, 1882, of NORTHAMPTON Superior Court, before *Graves, J.*

The defendants appealed.

Mr. S. J. Wright, for plaintiff.

Messrs. W. Bagley and *W. J. Peele*, for defendants.

SMITH, C. J. The action, begun before a justice and removed by appeal to the superior court, is for the recovery of the value of a quantity of seed-cotton taken and appropriated to the defendant's use. A formal complaint and answer were put in, and the controverted facts submitted to a jury, whose findings are favorable to the plaintiff.

The only exception that appears in the record is to the charge of the court, given in these words:

"If you, the jury, should find that the property was taken from the plaintiff by force and against his will, the same being in his possession, then the plaintiff would be entitled to some damages at least, although he had no title."

This charge would be clearly erroneous if the action, in form and substance, is but a substitute for the former action of trover, and to be governed by the same rules applicable to that, since trover is a mode of obtaining compensation for property unlawfully appropriated by the defendant, and that property must be general or special. The plaintiff fails if he has neither.

Trespass was a form of action to obtain redress for an injury to the possession of the plaintiff, and the damages awarded are commensurate with the injuries sustained, and may be to the full extent of the value of the property. Possession in both cases is, when unexplained, evidence of title to which it usually attaches. The distinction is pointed out in *Boyce* v. *Williams*, 84 N. C., 275.

But the present system of civil procedure abolishes the forms of action used in the old superseded practice, while retaining the essential principles, and the complaint is a statement of the facts

out of which the cause of action arises, and if sufficient, entitles the plaintiff to a recovery whether the facts would constitute an action on contract or in tort. *Oates* v. *Kendall*, 67 N. C., 241; *Jones* v. *Mial*, 82 N. C., 252.

This is the material change brought about in the practice, while the general "rules of pleading at common law and the essential principles still remain," modified only "as to technicalities and matters of form." *Parsley* v. *Nicholson*, 65 N. C., 207.

Recurring to the complaint, its averments of fact are as well adapted to a case of trespass as of trover, and, looking to the peculiarities of each, admit of a recovery in either form.

The defendant is charged with seizing the goods and appropriating them to his own use, and this is at once both a trespass and a conversion, and constitutes a cause of action.

There is no error in the charge and the judgment must be affirmed.

No error. Affirmed.

D. McK. CARMICHAEL and others v. JOHN C. MOORE and others.

Parties—Official Bonds, suits on in name of the State.

Suits upon official bonds made payable to the state must be brought in the name of the state. Bat. Rev., ch. 80, §§ 10, 11. The statute requiring the real party in interest to prosecute does not apply to such actions.

(*Little* v. *Richardson*, 6 Jones, 305, cited and approved).

CIVIL ACTION tried at Spring Term, 1882, of ROBESON Superior Court, before *Shipp, J.*

Messrs. McNeill & McNeill, for plaintiffs.
Messrs. Rowland & McLean, for defendants.

RUFFIN, J. This appeal is taken from a judgment of the superior court overruling a demurrer to the complaint, and but a single point need be considered.

The plaintiffs sue upon the official bond given by the defendant, Moore, as clerk of the superior court of Robeson county, with the other defendants as his sureties—the breach assigned being his failure to pay over certain moneys which came to his hands for the plaintiffs. The bond is made payable to the state, but the action is brought, and the complaint filed, in the names of the parties interested, and this is one of the grounds of the demurrer.

The bond sued on is the property of the state, and the only authority the plaintiffs have for putting it in suit is that which is specially given in the statute, and which in terms is limited to a suit brought in the name of the state. Bat. Rev., ch. 80, § 11.

Such is the plain provision of the law, long recognized, and supported by the uniform practice of the courts.

The statute, though an ancient one, has been re-enacted since the adoption of the Code, and the court would therefore feel themselves bound by it, as the latest declaration of the law, even in case of a conflict in the provisions of the two instruments.

But in fact there is no such conflict in this particular. The requirement of the Code that "every action must be prosecuted in the name of the real party in interest," was never intended to be applied to actions upon official bonds, made payable to, and held by the state, and intended to be sued upon by every person injured by the neglect of the officer, and as many as might be injured, until the whole penalty should be exhausted—and all, not by reason of any property in the bond itself, but by virtue of the authority specially granted by the statute. As the right to sue upon the bond is wholly derived from the statute, it must be exercised in the manner there provided and in no other way.

As reported, the case of *Little* v. *Richardson*, 6 Jones, 305, seems to furnish the plaintiffs with a precedent; but upon look-

ing to the original papers, we find that the action was in fact brought in the name of the state. So far as our investigations go, there is not a single authority which supports the manner of bringing their action.

The judgment of the court below overruling the demurrer is therefore reversed, and judgment will be entered here dismissing the action.

Error. Reversed.

In the matter of ELIZABETH LEWIS.

Parent and Child—Jurisdiction.

1. The jurisdiction of clerks of the superior court, in the appointment of guardians of infants, &c., does not extend to a case where the petitioner asks for the custody of a child who had been placed by its mother under the control of another.
2. The court intimate that a mother cannot make a disposition of her child, so as to confer upon another the right to its custody and control.
3. The correctness of the decision in *Jordan* v. *Coffield*, 70 N. C., 110, doubted.

PETITION to obtain possession of Sarah Jane Lewis, an infant, filed in the probate court, and heard at November Special Term, 1881, of HALIFAX Superior Court, before *Gilmer, J.*

In February, 1881, Benjamin Collins and Mrs. W. D. Lewis entered into an agreement under seal, whereby he engaged to support her during her life, and in consideration thereof she undertook to convey to him her child, Sarah Jane, until she should become of full age, the said child being illegitimate, and then of the age of ten years.

Soon thereafter the mother died, leaving the child in the possession of the said Collins, but in May following, Elizabeth Lewis, who was a sister to the mother, made application to the

clerk of the superior court of the county, to have the child taken from his custody, upon the score of his intemperate habits and moral unworthiness, and setting forth a purpose, if possible, to secure her a place in the Orphan Asylum at Oxford.

The clerk caused notice to be served upon Collins to show cause why the same shall not be done, and accordingly at the time appointed, he made answer, setting up the deed of the mother, and claiming to be entitled to have the child upon the strength thereof, and denying that his habits were bad, and professing to have become so much attached to the child as to be willing to adopt her as his own.

The clerk being satisfied of his unfitness to have the custody of the child, directed the sheriff to take her from his control, and place her with her aunt, the petitioner, and this was accordingly done.

Collins prayed an appeal from this order to the judge of the superior court, but the clerk holding him not to be entitled thereto, refused to allow it. He then applied for and obtained a writ of *certiorari*, and the matter was brought before the judge, who, after argument, dismissed the proceedings, upon the ground that the clerk had no jurisdiction in the premises, and his order was therefore void.

The respondent, Collins, then asked for an order restoring the child to his custody, as having been improperly taken from him, under color of the law, but His Honor having learned that she was then in the Asylum at Oxford, and, deeming that the best situation for her, declined to make such an order, and the respondent appealed.

Messrs. Mullen & Moore, for respondent.
Messrs. Day & Zollicoffer, contra.

RUFFIN, J. The jurisdiction of the clerks of the superior courts, in all matters, is regulated entirely by statute, and, in the case of infants, extends only to appoint them guardians, binding

them as apprentices, and (perhaps) granting orders allowing of their adoption. As the proceeding in this case falls under neither of these heads, it is clear to the court that the action of the clerk as regards this infant, was *ultra vires*, and it was proper therefore to dismiss the proceeding, as was done.

It is equally certain too, that the appellant acquired no *right* to the custody of the infant, Sarah Jane, under the deed of her mother. It may be questioned, in truth, whether in this state a mother can at all make a disposition of her child, though a minor, so as to confer upon another the right to have the custody and control thereof. This right, as well as that to the services of a child, is said by all authorities to be derived from, and dependent upon, the obligation which the law imposes upon the parent, to protect, educate and maintain the child during infancy, and when no such obligation is imposed, then no such rights exist. See Tyler on Infancy, 274—5, and the cases there cited.

In considering the obligations of a mother to support her infant child, this court declared in *Jordan* v. *Coffield*, 70 N. C., 110, that they were not the same or as great, as those of a father, and that the weight of authority was against such a liability on her part. If this declaration of the law is to be accepted as binding upon the courts, it would seem to put an end to every right of the mother to control the custody of her child, or to have its services. As the point, however, does not appear to have been necessary to the decision of that case, and as the principle asserted seems not altogether consistent with other authorities, or with the law of our nature, we may not feel ourselves bound by it, should the question be more distinctly presented in another case. But be this as it may, there is not the least doubt in the mind of the court, as to the utter want of authority on the part of a parent—whether father or mother—to sell a child, and for a selfish consideration, commit it to the keeping of another.

As touching the right to the custody of children, the doctrine of the common law have been greatly weakened of late, and

courts pay less regard to the strict legal rights of parents, even than they were wont to do, and look more to the interests, moral and physical, of the infants themselves—making it, indeed, their paramount consideration.

In Hurd on *Habeas Corpus*, 528, it is said that where the custody of children is the subject of controversy, the legal rights of parents and guardians will be respected by the courts, as being founded in nature and wisdom, and essential to the virtue and happiness of society, still the welfare of the infants themselves is the polar star by which the discretion of the courts is to be guided; and to the same effect is the treatise on Infancy before cited, and Schouler on Domestic Relations, § 248.

If this be so in the case of a parent, how much more ought it to prevail in the case of a stranger, who, like the appellant, bases his claim to the custody of an infant, not upon any law of natural affection, but upon a contract of purchase made with a dying mother.

In this, moreover, lies the distinction between this case and those relied upon by counsel, where it was held, that whenever a party had been wrongfully deprived of property under the color of judicial proceedings, the law must see him restored to the possession, or else be untrue to itself. Here, it is not property which is the subject of the action, nor anything in which, strictly speaking, the parties can be said to have any rights. Throughout the whole case, the petitioner and the respondent both profess to have been governed in their action by considerations for the comfort and welfare of the infant alone; and in making the same considerations the controlling motive for his action, the judge below did just what the authorities all say he should have done.

No error. Affirmed.

WILLIAM LARKINS and others v. JOHN BULLARD and others.

Infants—Vacation of Judgment.

A judgment taken against infant defendants is irregular and may be set aside at any time, where it appears there was no service of process upon them and no guardian appointed to protect their rights.

(*White* v. *Albertson*, 3 Dev., 241; *Mason* v. *Miles*, 63 N. C., 564; *Pearson* v. *Nesbitt*, 1 Dev., 315; *Keaton* v. *Banks*, 10 Ired., 381, cited and approved).

MOTION to set aside a judgment heard at Fall Term, 1882, of SAMPSON Superior Court, before *MacRae, J.*

The plaintiff began an action in 1871, in the superior court of Sampson county, against John Bullard, for the recovery of a tract of land. At the return term he answered, and the cause was continued from time to time until spring term, 1874, when an order was made directing Marcus, Irene, Virginia, Lewis and Thomas Bullard, children of the said John, to be made parties defendant, with leave to file answer.

At spring term, 1875, judgment was rendered that the plaintiffs recover the land of the defendants, which upon its face purported to have been rendered for want of an answer as to all the defendants, except the said John, and as to him there was a verdict finding that he was in possession of the land and unlawfully withheld the same.

Subsequently, John Bullard died, and in 1879 his said children gave notice to the plaintiffs of a motion to set aside the judgment, which motion was heard at fall term, 1882, when, after considering the affidavits and counter-affidavits filed by the parties and examining the dockets, the judge below found the facts to be as follows:

At the time the children of John Bullard were directed to be made parties, and also at the time the judgment was rendered against them, they were all infants and without any general guardian. They were not served with any process in the cause,

nor was any guardian *ad litem* appointed for them, or any answer filed for them. Their names nowhere appeared as defendants upon the docket of the court, and no attorney professed specially to represent them, though they were in fact represented by the attorney of their father, at whose instance alone they were ordered to be made parties. After the judgment, and before the notice to set it aside was issued, the plaintiffs were put in possession of the land under a writ of possession issued on the judgment, and under an execution issued thereon the costs of the action and a portion of the damages assessed by the jury, have been collected from the father and his sureties on the bond given to defend the action.

Upon the foregoing facts the judge below directed the judgment to be set aside as to the infant defendants, leaving it to stand as to John Bullard, and from this ruling the plaintiffs appeal.

Mr. D. J. Devane, for plaintiffs.
No counsel for defendants.

RUFFIN, J. The finding of the court seems to go to the length of saying that, notwithstanding the order directing it to be done, the infant children of John Bullard were never in fact made parties to the action, or any defence made for them; and if so, then, under the authority of *White* v. *Albertson*, 3 Dev., 241, the judgment against them was absolutely void *ab initio*, and it was proper to give them relief by directing the same to be vacated as to them. *Mason* v. *Miles*, 63 N. C., 564.

But supposing it to be otherwise, and that they could be made parties by having an appearance entered for them by an attorney, the judgment would still be clearly irregular, as being rendered contrary to the express provision of the statute and the uniform course of the courts. No court, with us, is authorized or accustomed to enter judgment against infants without the appointment of some one specially charged with the duty of

protecting their rights; and this must have been known to the plaintiffs and their attorneys when they procured the judgment to be signed—that they were getting a judgment such as the court ought not to grant, and such as it would not have granted, if rightly informed of the condition of the parties. Being then irregular, there can be no doubt of the power of the court to set it aside.

Neither have the parties lost their right to be thus relieved by the court by their delay in seeking it. In *Pearson* v. *Nesbitt*, 1 Dev., 315, the judgment was set aside, upon the score of its irregularity, after the lapse of seven years; and so it was done in *Keaton* v. *Banks*, 10 Ired., 381, after eight years had transpired, and after the judgment had been fully satisfied by a sale of property under an execution issued thereon. It would be a plain violation of right to leave the judgment standing, so as to operate as an estoppel upon these infants, when the court can see that no real defence was ever made for them. The case of *Mason* v. *Miles, supra*, is an authority for vacating the judgment as to some of the defendants, and leaving it to stand as to others.

The act of 1879, ch. 257, professing "to cure irregularities in certain judicial proceedings," cannot help the plaintiffs in this case; for that in terms applies only to cases in which the summons was issued, rightly naming the parties, but by some accident was omitted to be served.

There is no error, and the judgment of the court below must be affirmed.

No error. Affirmed.

REBECCA A. CHEATHAM v. JAMES A. CREWS and others.

Tenants in Common.

In partition of land, equality must be had by compensation in money for the deficiency, according to the value of the land at the time of division. The right to such compensation arises out of an implied warranty attaching to each share from all the others.

(*Nixon* v. *Lindsay*, 2 Jones' Eq., 230, cited and approved).

CIVIL ACTION tried, upon exceptions to a referee's report, at Fall Term, 1882, of GRANVILLE Superior Court, before *Shipp*, *J.*

Plaintiff appealed.

Messrs. Merrimon & Fuller, for plaintiff.
Mr. J. B. Batchelor, for defendants.

SMITH, C. J. In dividing the lands devised by James Crews to his eight children in the manner pointed out in the will, the plaintiff was awarded a share, lot No. 2, then supposed to contain 129 acres, and at a valuation by the acre amounting to the aggregate sum of $838.50. Some four years later, it was discovered that there was a mistake in the estimated number of acres, there being only 78½ acres in the lot and a deficiency of 50½ acres.

To correct this error and restore equality in the partition, the plaintiff instituted this action; and when the case was before us on a former appeal (83 N. C., 313), it was declared that the apportionment must stand, and that the plaintiff was entitled to compensation in money for the value of the deficiency in the estimated area of her part.

The present appeal, from a ruling of the court sustaining the defendants' exception to the referee's report, in which the sum to be contributed for equality in the division is estimated upon the basis of the present value of the land, brings up for decision

the question whether the land is to be valued as of the date of the partition, or at the period when the estimate is made by the referee. Upon the former basis, the sum to be contributed, as ascertained by the court, will be $328,25; upon the latter, in consequence of appreciation in value, it will be increased to $750.

We were referred to no adjudicated cases bearing upon the point, in the argument of counsel, and our own researches have been alike fruitless.

The cases which have come under our observation recognize fully the right of a tenant in partition, whose share in part is found to consist of property not held in common, to seek redress for his loss in compensation obtained from the others, as in *Dacre* v. *Gorges*, 2 Sim. and Stu., 453; or in case of eviction from a portion by one having a superior title. *Sawyer* v. *Cator*, 8 Hump., 256; *Ross* v. *Armstrong*, 25 Texas, 372; Freeman on Co. and Part., § 533.

The right to compensation seems to be put upon the ground of an implied warranty attaching to each share from all the others.

In *Nixon* v. *Lindsay*, 2 Jones' Eq., 230, a partition of shares was made among the tenants in common by commissioners acting under a decree of the county court, and their report was confirmed. In the division were allotted to the plaintiff two slaves, one of whom, valued at $400, was then sick, but the disease was supposed to be temporary and not affecting her value. But it proved to be a deep and fatal disease, causing death in two months thereafter, notwithstanding the best medical treatment and care. The bill was filed to obtain contribution for the loss, and the plaintiff's equity declared, upon two grounds: 1st, of an implied warranty of title and soundness in the partition of chattels held in common as to each share; and 2d, of a mutual mistake, which will be corrected to give effect to the manifest intent of the parties. It was accordingly decreed that the plaintiff should have contribution from the others for the value of the slave, loss of services, and expenses incurred in the last illness

of the slave. This value we suppose to be that fixed by the commissioners, or else there would not have been added the other loss in service and expenditure; and this seems to be the equitable and reasonable relief to which the plaintiff was entitled.

If the partition of the land in the present case had been made with full knowledge of the number of acres contained in the plaintiff's lot, and without objection thereto on her part, she being content to have it made equal in value to the others, by an assessment on them to be paid in money, it is obvious the estimate would have to be made of the value of the deficient land, as of the land divided, ascertained at the time.

Our refusal to disturb the division, requires to be done now what ought to have been done then, and this is to give the plaintiff a sum of money which would have produced equality in the division, when made, with interest since accrued.

If lands thus situated had fallen in market value, the plaintiff, who might have averted loss by converting her share into money, ought not to suffer loss from depreciation, and for the same reason she ought not to have an increase from their subsequent advancement. All that the plaintiff can reasonably ask in relief from the consequences of a common mistake, when a new partition cannot be made, is to be restored to the right of compensation as it then existed, and not as affected by subsequent events.

We therefore affirm the ruling of the court and declare there is no error.

No. error. Affirmed.

M. C. PERKINS v. J. L. PERKINS.

Divorce—Evidence.

1. In divorce for alleged adultery, neither the husband nor the wife is a competent witness; nor shall the admissions of either be received as evidence to prove the fact. Bat. Rev., ch. 17, § 341.
2. Evidence of the physical condition of the party with whom the adultery is alleged to have been committed, was properly excluded where no acts of intimacy had been shown.

(*Hansley* v. *Hansley*, 10 Ired., 506, cited and approved).

CIVIL ACTION for divorce tried at July Special Term, 1882, of GASTON Superior Court, before *Gudger, J.*

The plaintiff brings this action against his wife, seeking to be divorced *a vinculo matrimonii*, and alleges that he intermarried with the defendant in Gaston county in August, 1857—both being then and at all times since residents of said county; that about the 15th of July, 1872, the defendant was guilty of adultery with one Michael Rhodes, and was before and after that time guilty of repeated acts of adultery with said Rhodes and other persons in said county; that plaintiff then separated himself from her, and has had no intercourse with her since that time, and therefore he prays to be divorced.

The statement of the case on appeal is as follows: "After the jury were empannelled, the plaintiff showed forth in evidence that the parties had intermarried in 1857, and had lived together as man and wife in Gaston county till the year 1872, when, for the causes hereinafter set out and also shown forth in evidence, the plaintiff separated from his wife, and has not lived with her since. For three months prior to such separation, the plaintiff had been absent at work in South Carolina, and when he returned, a short while before the separation, he was a sound and healthy man. When he returned, his wife was suffering with what appeared to be some affection of the skin, and shortly thereafter

and in the time usual for the communication of said disease, the plaintiff began to be similarly affected. Upon his first returning, he consulted a physician as to the character of his wife's affection, and was told that it was merely a disease of the skin; but when he was himself affected, he advised with another physician, and was informed that it was syphilis. Both he and his wife had syphilis, he having contracted the same from her, and from the effects of which he had never recovered, even up to the time of the trial."

"The plaintiff then proposed to show that, when he returned and told his wife what the physician pronounced her disorder to be, she declared that Michael Rhodes, the party charged in the complaint, had given her the disease, and to show that she had made similar statements, both before and after their separation; but this evidence was excluded by the court."

"The plaintiff then offered evidence going to show that, during his absence in South Carolina, the said Rhodes resided within a short distance of the defendant's house, and then proposed to show that at that time he (Rhodes) was laboring under the same disease; but this evidence was also excluded, upon the ground that no acts of intimacy between the defendant and Rhodes had been shown."

The plaintiff thereupon submitted to a nonsuit and appealed.

Messrs. Hoke & Hoke, for plaintiff.

No counsel for defendant.

RUFFIN, J. The complaint is so meagre in its statement of the facts, and, even taken in connection with the proofs, furnishes so little insight into the conduct of the parties, and particularly the treatment of the wife by the husband prior to her alleged delinquency, that it is a relief to the court to be able to say, that, according to our understanding of the law, no error was committed in the court below, of which the plaintiff can justly complain. Indeed, though not entirely apparent, we

cannot avoid an impression, arising out of the statement of the case itself, that, as it was, he succeeded in getting before the jury much testimony which properly should have been excluded. His own physical condition and exemption from secret disease, at the time of his return from South Carolina, were so peculiarly within his own knowledge, and so difficult of knowledge by another, that it seems impossible to doubt that he was, himself, permitted to testify directly to those matters; and if so, it was improperly done, since those facts were intended to be used, and were used, as links in a chain of circumstances to convict the defendant of the adultery alleged in the complaint—of which there seems to have been literally no direct proof.

Be this however, as it may, there can be no question in the minds of the court, as to the propriety of excluding the testimony with reference to the admissions of the defendant. The provision of the statute is so pointed and its language so plain—that in such trials, neither the husband nor the wife shall be a competent witness to prove the adultery of the other, nor shall the admissions of either be received as evidence to prove such fact—as to leave no room for doubt or construction.

This prohibition, as has been often said by the court, proceeds out of that regard which the law always has for good morals, and that interest which society has at stake in the preservation of the marriage relations of its members, seeing that they are not only essential to social order, but that they constitute the foundation of society itself, and it is the duty of the courts to see that neither this policy of the law nor public interest is impaired through the collusion of the parties, and in fact that it shall not even encounter the risk of being so impaired: for, as said in *Hansley* v. *Hansley*, 10 Ired., 506, this policy of excluding the admissions of the parties depends, not so much upon the ground that there is collusion between them, as upon the danger that there may be.

There is nothing in the facts of the case to make it an exception to the general rule; nor is there anything to support the

distinction, which counsel attempted to make, that as the guilty conduct of the defendant had been established by other evidence, the only effect of her admissions, if received, could have been to corroborate or give point to that evidence. Conceding that all the testimony actually received was legitimate, and that its effect was to establish a lack of chastity on the part of the defendant, still, the issue remained as to her guilt of the *adultery* alleged against her. It was this the plaintiff sought to establish by evidence of her confessions made to himself; and failing to secure the evidence, he abandoned the issue, thus proving that the admissions were intended to be used, not as corroborative, but as substantive testimony—and the only testimony within the plaintiff's reach—tending to prove the fact in dispute.

It is impossible to conceive of a case more certainly coming within the mischief of the statute than the present, or one in which its enforcement could be more necessary, because of the opportunity for collusion afforded by the very nature of the accusation and the length of the time since the offence is said to have occurred.

Nor was it error to exclude the testimony as to the diseased condition of the individual, Rhodes; and for the reason assigned by the court. If established as a fact, its relation, in the then state of the proofs, with the fact in issue, would still be so remote as really to amount to no proof of it, and hence it was proper to exclude the evidence with regard to it.

Our conclusion, therefore, is that the judgment of the superior court must be affirmed.

No error. Affirmed.

HARRIETT A. GORDON v. G. N. GORDON.

Divorce and Alimony—Condonation.

1. Condonation is forgiveness with a condition, that is to say, the offence is forgiven if the delinquent will abstain from the commission of a like offence afterwards, and treat the forgiving party with conjugal kindness.
2. Where a separation takes place on account of the cruel treatment of the husband, and the wife returns upon the promise of better treatment on his part; *Held*, that his subsequent cruelty operates as a reviver of the original offence.
3. The amount of the alimony is discretionary with the court below.

(*Webber* v. *Webber*, 79 N. C., 572; *Schonwald* v. *Schonwald*, Phil. Eq., 215, cited and approved).

PETITION for divorce and alimony heard at Spring Term, 1882, of UNION Superior Court, before *Gudger, J.*

The allegations in the petition, deemed material to the inquiry before the court, are as follows:

The parties were married on the 15th of August, 1876. While the petitioner was pregnant with her first child in July, 1877, and while she was sick in bed, a daughter of the defendant by a prior marriage had been on a visit from home for several days, and on her return, the plaintiff told her to change her dress, which she readily did, and the defendant hearing her request, came into the room and abused her by using rough language—calling the plaintiff a fool and threatened to whip her as soon as she was able to bear it, and told her as soon as she was sufficiently recovered she might go home and stay there. About three weeks afterwards, while she was still feeble, she requested the defendant's daughter to draw some water, and she refused in the presence of the defendant, and the plaintiff was compelled to draw the water herself, though unable to do so. She then scolded the girl slightly, and told her she should have drawn the water and not compel a sick woman, who was unable to do so, to draw it. The defendant thereupon went off and got

a hickory switch about three or four feet long, and larger than one's thumb, but did not use it—there being some one present—but carried it up stairs.

About the 19th of October, 1877, shortly after the birth of her first child, she reproved a son of the defendant (a small boy) for some improper conduct, and threatened to whip him if he repeated it, and after this he stood in the door of the house and urinated in the presence and hearing of the other members of the family, and she corrected him for it for his benefit, and in no unkind spirit. The defendant immediately thereafter became enraged and said the plaintiff was the one who ought to be whipped, and went up stairs and brought down the hickory which he had provided on the former occasion, and with it inflicted several severe blows upon her, saying, at each blow, "damn you, take that," and also striking her in the face with his fist—leaving bruises on her face and back and causing the blood to settle under her eyes and upon her throat, which remained for several days, and one of her eyes was injured to such an extent as that it is still affected. The whipping continued until she escaped from the defendant and ran from the house, when he pursued her and carried her back and locked her up during the night, and for two weeks thereafter would not permit any one to see her—making her withdraw when any one came. The whipping was done in the presence of defendant's children.

About a month after this, when she had reproved and pushed to one side the defendant's daughter for putting an unclean spoon in the rice at breakfast, and the girl commenced crying, the defendant, after finishing his breakfast in silence, rose from the table and cursed and abused the plaintiff, accused her of hurting the child, seized her by the hair and throat and choked her until she was about to faint, and at the same time struck her several blows; and being faint, she requested a son of the defendant who was present to hand her some water, but the defendant commanded him not to do it, saying she should not have water until

he said so. On the same day, after this abuse, while she was at the house of a brother of defendant, he came there and, in the presence of his brother's family and another brother's wife, accused the plaintiff of being a thief, charging her with having stolen rice and given it to her mother.

Within a month or so after the choking, while she was talking with a negro woman who wanted to buy an old bed tick which the plaintiff was willing to sell in order to buy a new one, the defendant cursed the woman, and said the plaintiff should not be trading on his things, and that he would hang her if he was hanged for it the next day, and that she ought to be treated like Maggie Stevenson, who, with her child, was said to have been murdered by her husband; and the defendant having at that time some horseshoes in his hands, she, fearing he might execute his threat, left the house and remained away until defendant left; and when she returned in the hope of getting her infant and then leaving until the passion of the defendant had subsided, the defendant, seeing her going off with the child, caught her and carried her back.

In March, 1878, a sister of defendant came to the house and was so abusive to the plaintiff that she told the defendant that she and his sister could not pleasantly remain together in the same house, and she started to leave, but defendant overtook her and said if she would return he would send her to her mother's, which he did on the 10th of March, 1878. She remained at her mother's until the 13th of April, 1879, when, upon the frequent importunities of the defendant and his promises to act as a husband ought to do, she was induced to return to his house. On arriving there, she found a woman by the name of Ellen Taylor living in the house and in full charge of the domestic affairs, and whose manners and habits did not suit the plaintiff, which the defendant well knew, and yet he kept her there for six months, giving her more privileges than were allowed the plaintiff. On one occasion while Ellen Taylor was staying there,

the defendant told the plaintiff that some day Mrs. Taylor would knock her down and he would not protect her.

In the month of November, 1879, when she was in about three months of the time of confinement with her second child, she requested the defendant's daughter, Lizzie, then twelve or thirteen years old, to assist her in cooking dinner, which she refused to do; and in order to teach her obedience, she told Lizzie she should have no dinner unless she assisted her to get it. She still refused, and went without dinner. When the defendant returned in the afternoon and Lizzie told him what had occurred, in the presence of two of his children and a young man who was staying on the premises, he cursed and abused her, and accused her of attempting to starve his children; and when, to avoid any punishment at his hands and to escape the humiliation of being abused in the presence of others, she started to leave the house, he caught her around the neck with both hands and chocked her so severely that she dropped her two year old infant which she held in her arms, and it fell upon the floor and hurt its head very severely. The marks of violence occasioned by his conduct remained upon her neck for a week or more, and were seen by several of her neighbors.

He accused her of stealing his thread and giving it to her sisters on the occasion of their visit to her, and at various times he went among the neighbors and made accusations against her, which were derogatory to her character and hurtful to her feelings. At the house of J. H. Winchester, in presence of his family, he accused her of being a liar. He frequently reproached her with being poor, telling her she brought nothing there. On the morning of the 26th of January, 1880, when she forbade a son of the defendant by a prior marriage, from opening a drawer in which she had some clothes—prepared for the child expected to be born in about two weeks—the defendant told the boy to go into the drawer whenever he pleased; that the drawer was not hers; he continued to abuse her in the presence of a young man named Plyler, and accused her of stealing thread.

The petitioner further alleged that in her rearing she had been accustomed to affectionate and considerate treatment, and was always a stranger to the coarse and improper treatment she had received at the hands of her husband; that during her married life she had discharged her duty as a wife, and had tried to please her husband, and had done nothing to provoke the treatment she received; she lived with him out of regard for her marriage vows, as long as she could without entirely surrendering all self-respect, and until the indignities offered to her person were such as to render her condition intolerable and life burdensome.

The petitioner asks for a decree for divorce and alimony, and that the children be placed in her care.

Affidavits were filed by both parties in regard to the pecuniary condition of the defendant, and the court, upon the consideration of the facts therein stated, adjudged that defendant pay plaintiff, or pay into court for her use, the sum of one hundred dollars per annum, *pendente lite*, and that the sum of fifty dollars be paid on or before the first day of July next, and the remainder ($50) be paid on or before the first day of October next. It was further ordered that the clerk of the court issue a copy of this judgment to be served on the defendant, and that if he failed to pay the sums as above specified, notice should issue to him to show cause why he should not be attached for contempt of court. From this judgment the defendant appealed.

Messrs. Covington & Adams, and *Haywood & Haywood*, for plaintiff.

No counsel for defendant.

ASHE, J. The petition is filed under sub-division 4, section 5, chapter 37 of Battle's Revisal, for divorce *a mensa et thoro*, and for alimony. The application for alimony is made under section 10 of said chapter, and so far as relates to her pecuniary

condition, the petitioner has brought herself within the purview of the statute.

The question is whether the facts stated in the petition are sufficient to entitle the petitioner to the relief demanded.

The petitioner alleges that she left the defendant's house on the 10th of March, 1878, and remained away until the 13th of April, 1879, and was induced to return by the frequent importunities of the defendant and his promises to treat her as a husband should do. But in violation of his promise, he kept a woman some six months in the house in full charge of his domestic affairs, giving her more privileges than were accorded to the petitioner, when he knew the woman was very obnoxious to her; that he abandoned and cursed her accused her of starving his children—caught her around the neck and choked her with great severity, so that the marks of his violence remained upon her neck for a week or more—charged her of stealing repeatedly—denounced her as a liar to the neighbors, and frequently during their married life reproached her with her poverty.

This was certainly very reprehensible conduct in the defendant, and must have been very annoying and humiliating to the petitioner. But whether these facts taken alone are sufficient to give the relief demanded in the petition, we are not, under the circumstances of this case, called upon to decide. For even if these facts are not of themselves sufficient, they are of such a character as to revive the transactions occurring before the separation, and obliterate the condonation arising from the return of the petitioner to the house of the defendant.

We are not aware of any adjudication of this court upon the effect of subsequent cruelty, after condonation, in reviving antecedent transactions; and there is some diversity of opinion among judges and law writers upon the subject. But the decided weight of authority is in favor of the proposition that it operates as a reviver of the original offence.

Condonation, says an eminent judge, is strictly a technical

word. It had its origin in the ecclesiastical court of England, and means "forgiveness with condition." The condition is, that the original offence is forgiven, if the delinquent will abstain from the commission of a like offence afterwards, and moreover, treat the forgiving party in all respects with conjugal kindness. Bishop on Divorce, § 53.

Condonation extinguishes the right of complaint, except for subsequent acts, and is accompanied with an implied condition that the injury shall not be repeated, and that a repetition of the injury takes away the condonation, and operates as a reviver of former acts. Shelford on Mar. & Div., 446.

In *D'Aquillar* v. *D'Aquillar*, 1 Haggard Ex., 733, LORD STOWELL is reported to have held, "that words of heat and passion, of incivility or reproach, are not alone sufficient for an original cause, nor hardness of behaviour; but I cannot think their operation would be stronger in condonation. Words otherwise of heat receive a different interpretation, if upon former occasions they have been accompanied with acts, if it is apparent that the habit of following up words with blows, and on these grounds I am of opinion much less is sufficient to destroy condonation than to found an original suit."

In Massachusetts, it has been held that, when the wife had condoned the husband's cruelty by cohabiting with him after it was inflicted, but the husband, soon after the act of cruelty, continuously for weeks refused to speak to her, though living in the same house, the condoned cruelty was revived. The court said that "such evidence of persistent unkindness and ill-temper warranted the wife or the court in inferring that his smothering anger would break out again into acts of cruelty." *Robbins* v. *Robbins*, 100 Mass., 162.

In New York, it was held by a majority of the court, in *Johnson* v. *Johnson*, 14 Wend., 637, that where the husband's adultery had been condoned by his wife, the condonation was destroyed by the husband's subsequent neglect to attend to her

comfort, by insulting her with opprobrious epithets and by pursuing a course of conduct towards her calculated to wound her feelings, although no subsequent adultery or even acts of violence were charged.

In South Carolina, in the case of *Threewits* v. *Threewits*, 4 Des., 560, cited in Bishop on Marriage and Divorce, which was a case where the husband was addicted to the habit of intemperance and of abusing his wife in his fits of intoxication, and after a separation they became reconciled, it was held that his wife might, in aid of her proofs of subsequent cruelty, show his former abuse in connection with its cause, and his subsequent intoxication.

After the parties in our case had been separated for the space of thirteen months, the defendant frequently importuned the petitioner to return to his house, which she consented to do, under his promise to treat her as a wife should be treated by her husband. But he violated his promise, by resorting to the same wicked and cruel course of conduct which had caused their separation. This, upon the authorities above cited, took away the condonation and revived all the acts of cruelty occurring before the separation. The inquiry then is, were they of such a character as to entitle her to the relief demanded.

Rarely, if ever, has a case come before the court appealing more strongly to the law for protection. The conduct of the defendant towards his wife, if true, and we must take it to be true for the purposes of the motion, was unmanly, wicked and cruel. He called her a fool and made against her the unfounded charge of theft. While she was lying prostrated by sickness, he cursed her and threatened to whip her as soon as she recovered sufficiently to bear it; and, as if with the premeditated purpose of carrying his threat into execution, he procured a large switch and put it away for the purpose of using it on such occasion as his bad temper might dictate. Upon the slight provocation of correcting one of his children for indecent conduct, the switch

was sought, and with it a severe castigation inflicted upon the petitioner by the defendant; at each blow saying, "damn you, take that." He struck her at the same time in the face with his fist, leaving bruises upon her face and back, and causing permanent injury to one of her eyes; and when she attempted to escape from his fury, he caught and carried her back and locked her up during the night, and would not permit any one, calling at the house, to see her for two weeks. At another time, being enraged with the petitioner, he seized her by the hair, choked her and struck her several blows; and when being faint from the effects of his violence, she asked for water, he refused to let her have any. After this, he threatened to hang her, and said she ought to be treated like a certain woman who, with her child, had been murdered by her husband.

No one who reads this catalogue of indignities and cruelties would hesitate to say, that under such treatment the condition of the petitioner must have been intolerable and her life burdensome. Such is our opinion, upon the assumption that the facts are true; but their truth with the extenuating circumstances is to be tried by a jury.

Many affidavits as to the pecuniary condition of the defendant, in his behalf, were sent to this court with the record, under the belief, we suppose, that this court would review the ruling of His Honor in the matter of alimony. But this court has no jurisdiction to change the amount: it is matter of discretion in the superior court. *Webber* v. *Webber*, 79 N. C., 572, and *Schonwald* v. *Schonwald*, Phil. Eq., 215.

There is no error. Let this be certified.

No error. Affirmed.

CITY OF WILMINGTON v. ATKINSON & MANNING.

Practice—Controversy without Action.

The court will not hear a controversy without action, under section 315 of the Code, in the absence of an affidavit that the same is real and in good faith to determine the rights of the parties. *Grant* v. *Newsom*, 81 N. C., 36, approved. (Other irregularities, in reference to the manner in which the cause was conducted as shown by the record, pointed out).

(*Grant* v. *Newsom*, 81 N. C., 36, cited and approved).

PROCEEDING heard at Fall Term, 1882, of NEW HANOVER Superior Court, before *MacRae, J.*

The proceeding is against the defendants and several others, doing business as insurance agents in the city of Wilmington. The city ordinance imposes a license tax for the privilege of carrying on such business within its corporate limits. The defendants were duly licensed under the provisions of the insurance law of the state, and it is the object of this proceeding to ascertain whether they are liable to a city tax. The court below held in favor of the defendants, and the plaintiff appealed.

Messrs. DuBrutz Cutler and *E. S. Martin*, for plaintiff.
Messrs. Russell & Ricaud, for defendants.

SMITH, J. It is impossible, without utterly disregarding the forms and proprieties of judicial procedure, to entertain an appeal and pass on the error assigned upon such a record as is before us.

It appears upon a statement of facts, out of which arises the controversy to be settled, declared, by the justice assuming jurisdiction and rendering judgment, to have been agreed on between the parties, but supported by no other authentication, that he proceeded to hear and decide a claim of the plaintiff against five separate and independent insurance agencies, for taxes against each, while there is no community of interest whatever among

them, unless it be in the solution of a question of law upon which the liability of each depends.

This proceeding seems to have been intended to be conducted under section 315 of the Code, which has no application to the court of a justice of the peace; and if it does, there is no accompanying affidavit, as required, "that the controversy is real, and the proceeding in good faith, to determine the rights of the parties." The justice's judgment is found in the transcript and no other memorial of what transpired before him, nor that an appeal was taken.

The record next contains another fuller statement of facts agreed, taking no notice of what occurred in the justice's court; and this is authenticated by the signatures of counsel representing both parties, and equally defective in the absence of the required oath. It is laid before the judge of the superior court, not to be acted on while holding the session of the court, and he proceeds to render judgment against the plaintiff for costs of the several defendants.

If the jurisdiction assumed by the judge be *original*, there is a fatal want of jurisdiction, since the aggregate sum claimed from the defendants is but one hundred and forty-eight dollars, and the absence of the affidavit as held in *Hervey* v. *Edmunds*, 68 N. C., 243, and *Grant* v. *Newsom*, 81 N. C., 36.

If the jurisdiction exercised be appellate, it is not so shown in the transcript, nor is the chasm which separates the courts bridged over, so that we can see how the case passed from one to the other. Apparently, the two repugnant adjudications subsist.

In any aspect of the case, nothing remains for us to do but dismiss the action, and it is so ordered.

PER CURIAM. Dismissed.

E. C. JONES v. COMMISSIONERS OF FRANKLIN.

County Commissioners—Practice—Controversy without Action.

1. The board of county commissioners is not such a judicial tribunal, that its decision in passing upon claims against the county can be reviewed on appeal. The proper remedy to test the validity of a rejected claim, is by civil action.
2. Appeals from the decision of the board acting under the provisions of the revenue law, are recognized by the act of 1881, ch. 117, § 24.
3. A controversy without action must be submitted to a court which would have had jurisdiction if the action had been commenced by summons; and it must also appear by affidavit that the same is real and in good faith.

(*Boing* v. *R. R. Co.*, 87 N. C., 360, cited and approved).

PROCEEDING heard at January Special Term, 1883, of FRANKLIN Superior Court, before *Philips, J.*

The plaintiff was register of deeds of Franklin county, and *ex officio* clerk to the board of commissioners, and as such presented a claim to the board for issuing orders on the treasurer of the county for the payment of money, to-wit: fifteen cents for each order, as provided in Battle's Revisal, ch. 105, § 25, subdivision 5, in addition to ten cents for recording each order.

The board allowed the latter sum, but refused the claim for the said additional sum of fifteen cents, and the plaintiff appealed to the superior court from the judgment of refusal.

His Honor sustained the ruling of the board, and gave judgment in favor of defendants for costs, from which the plaintiff appealed to this court.

Mr. A. M. Lewis, for plaintiff.
Mr. Jos. J. Davis, for defendants.

SMITH, C. J. The case agreed, signed by the counsel of the contesting parties, and upon which the judgment was rendered

in the superior court, states, that the disputed claim was presented to the board of county commissioners for recognition and payment, and from their refusal to allow the same, an appeal was taken to that court. No transcript of the action of the commissioners in the matter is sent up to that, or transmitted, in the appeal, to this court.

We know of no law that constitutes the board, in passing upon claims against the county, such a judicial tribunal that its decisions can be reviewed, and its errors corrested by an appeal to the superior court, whose appellate jurisdiction is derivative only and presupposes a right in the inferior tribunal to take judicial cognizance of, and try the cause. *Boing* v. *R. R. Co.*, 87 N. C., 360.

The proper course to test the validity of the rejected claim is to bring an action in the ordinary way before a justice or in the superior court, as the one or the other may have jurisdiction of the matter, against the commissioners. We cannot allow such a disregard of the established forms and modes of procedure, even with consent of counsel, without introducing confusion in the practice and in our judicial records. It is a case of *coram non judice*, and the proceeding must be dismissed.

The Code provides for submitting a controversy without action, but upon two essential conditions to a valid determination of the rights of the parties, neither of which are present here: 1. The submission must be made to a court which would have jurisdiction if the action had been commenced by summons. 2. It must appear by affidavit that the controversy is real, and the proceeding in good faith, to obtain a decision upon the rights of the parties. C. C. P., § 315; *Wilmington* v. *Atkinson*, *ante* 54.

It is true appeals have been entertained from the decision of county commissioners, acting under the provisions of the revenue law, and this was conferred in express terms by statute, and is recognized as a right of the tax-payer in the act of 1881, ch. 117, § 24.

The proceeding must be dismissed, and it is so ordered.

PER CURIAM. 8 Dismissed.

R. J. GILL, Adm'r, and others v. D. E. YOUNG and others.

Amendment of Pleading.

Where pleadings are amended by permitting a defendant to make a case against his co-defendants, involving a change of the subject matter of the original suit, it amounts to bringing a new action on his part, and the defendants cannot be restricted in their pleas, but may set up any legal defence, as a matter of right.

(*Christmas* v. *Mitchell*, 3 Ired. Eq., 535; *Cogdell* v. *Exum*, 69 N. C., 464; *Henderson* v. *Graham*, 84 N. C., 496, cited and approved).

CIVIL ACTION tried at Fall Term, 1882, of GRANVILLE Superior Court, before *Graves, J.*

This suit was begun on October 1, 1877, by plaintiffs, creditors of William H. Hughes, against the defendants, D. E. and I. J. Young, for an account of certain real estate conveyed to them by the debtor in a deed absolute in form, but alleged to be upon a parol trust to provide for the payment of certain notes due the plaintiff, Hights, and the intestate of the co-plaintiff, Gill, and also to the Bank of Cape Fear, in which the defendant, D. E. Young, was one of several sureties, and for his personal indemnity.

The plaintiffs also ask to have adjustments, had with the said D. E. Young, in which they respectfully surrendered to him their evidences of the debts, set aside, and each restored to his full right to enforce the same, upon the ground of misrepresentation and fraud, by which they were induced to enter into the settlements of their several claims, offering to return what each had received or to account for the full value of what cannot be returned.

The defendants deny the personal imputations of fraud and the allegations of any trust in connection with the conveyance of the lot in question, averring that the deed was made, in form and in fact, an absolute conveyance, the consideration of which

was the assumption by the defendants of the indebtedness due by Hughes to the bank, of the scaled value of two thousand dollars, as their own, and the exoneration of the said Hughes therefrom, which debts have been fully discharged.

The grantor, becoming a party defendant in the cause, also answers, affirming the purposes of his said deed to be as set out in the complaint, except that in the trust were included and provided for all debts to whomsoever due by him, and to which the other defendants, both or either one, were sureties, and for their full indemnification.

In this state of the pleadings, numerous issues were submitted to the jury, most of them in reference to the settlements in which the notes held by the plaintiffs were given up, and it is only necessary to advert to the two, which relate to the character and objects of the deed:

1. Was the deed, dated June 2, 1866, made by W. H. Hughes to D. E. and I. J. Young, purporting to convey a house and lot in Henderson, made upon a trust to secure the payment of the debts due from Hughes, with D. E. Young as surety, to Robert Gill and W. H. Hights, and other debts of Hughes, to which D. E. and I. J. Young were sureties? Ans.—No.

2. Did the plaintiffs have knowledge of the alleged secret trust more than three years before the bringing their suit, or the means of knowing it on reasonable inquiry? Ans.—There was no trust.

Upon the rendition of the verdict upon these and upon all the other issues, unfavorable to the plaintiffs, the court gave judgment for defendants, D. E. and I. J. Young, against the plaintiffs, retaining the cause as involving a controversy between Hughes and the other defendants—entertained without acting upon a motion of the former for an account, and gave him leave to amend his pleading and substitute a complaint, as in an adversary action, against the defendants, D. E. and I. J. Young, for an account of the alleged trust fund, on his entering into bond with surety in the sum of two hundred dollars, with

condition for the payment of costs which they may recover by reason of his failure to prosecute his action with success.

Thereupon, the said I. J. Young filed an affidavit, based on a writing exhibited and used as evidence on the trial, in which, his memory being revived, he corrects some of the statements contained in his answer in relation to the transaction. The writing is made part of the affidavit, and is a penal bond in the sum of four thousand dollars, executed by himself and the said D. E. Young, his father, to said Hughes, with condition to be void if they shall pay off the debt due by him to the Bank of Cape Fear, estimated to be, when sealed, some two thousand dollars, and relieve and exonerate said Hughes from his liability.

Upon this affidavit, these defendants ask leave to amend their answer and to put in their defence to the case to be made in the proposed substituted complaint of Hughes, and the court assented thereto, as to all matters of defence set up in the affidavit, but refused to allow any defence arising out of the statute of limitations or the statutory presumption raised from lapse of time.

From this ruling, whereby the defendants are restricted as to their defence and not left at liberty to put in all allowed by law, they appealed.

Messrs. Merrimon & Fuller and *J. J. Davis*, for plaintiffs.
Mr. D. G. Fowle, for defendants.

SMITH, C. J., after stating the facts. The finding of the jury, to which we have adverted, that there was no unwritten trust or agreement attaching to and following the transferred estate in the lot, with the accompanying and sustaining covenant obligation entered into by the grantees, would seem to have effectively disposed of the subject matter of litigation and conclusively to establish the fact that they are only liable to that undertaking to pay off and discharge the debt, as if they were principals therein, as between themselves and Hughes. But, as the cause has progressed beyond that point, and the grantor, Hughes, has permis-

sion to change his relations towards the other defendants and by an amendment make himself a party plaintiff, and set out a cause of action against them (the judgment rendered retiring the original plaintiffs from the cause), it is not only reasonable and proper, but it is the right of these defendants in resisting the claim to set up any and all legal defences that would be open to them if the suit were now commenced; and a ruling which permits the one and refuses the other, is a clear denial of a right, and not the exercise of a discretionary power residing in the judge and beyond correction.

It is in form an amendment, but the starting point of an action wholly different and involving a change of the subject matter of controversy; and if this is admissible, it must be attended with the consequences of an action then in fact first begun, and remitting the defendants to the same right of defence.

Amendments are not allowed when the effect is to deprive the other party of his available defences to a new action. *Christmas* v. *Mitchell*, 3 Ired. Eq., 535; *Cogdell* v. *Exum*, 69 N. C., 464; *Henderson* v. *Graham*, 84 N. C., 496.

We do not modify the repeated rulings of this court, that amendments to the pleadings rest in the breast of the presiding judge, and his allowing or refusing them is an exercise of his discretion not reviewable by us. But under the form of amending, when a new cause of action is permitted to be inserted, and the complaint contains matter to which a former was not and could not be responsive, the new defendant cannot be denied his right to put in an answer responsive to the new case made in the complaint, and to set up therein any legal defences that he may possess. The one ruling involves the other.

Error. Reversed.

W. T. BOING v. RALEIGH & GASTON RAILROAD COMPANY.

Recordari, application for writ of—Laches—Attorney and Client.

1. Motion for writ of *recordari*, as a substitute for an appeal, must be made at the next ensuing term of the appellate court.
2. Neglect of attorney and that of the party—distinction between noted.

(*Webb* v. *Durham*, 7 Ired., 130; *Hahn* v. *Guilford*, 87 N. C., 172; *Bradford* v. *Coit*, 77 N. C., 72; *Brown* v. *Williams*, 84 N. C., 116, cited and approved).

MOTION to dismiss a *recordari* heard at July Special Term, 1882, of VANCE Superior Court, before *Graves, J.*

On the 12th day of December, 1881, the defendant moved for, and obtained from the superior court of Vance county, a writ of *recordari* to bring up a certain proceeding theretofore had before a justice of the peace and two freeholders of the county, under the act providing a remedy for the owner of stock killed by a railroad.

In support of the motion, the defendant filed an affidavit of one of its agents, in which it was set forth that the trial before the justice and freeholders occurred on the 11th day of September, 1880, when judgment was rendered for plaintiff in the sum of $40.00, and for costs; that then and there, in open court, an appeal was prayed for the defendant and allowed by the justice, and under an arrangement between counsel, a short time was given to the defendant to give an appeal bond; that the bond was given and all the costs were paid, including the fees to the justice for the appeal, who promised to send up the case to the next term of the superior court, to-wit, the fall term, 1880; that defendant supposed the same had been done, and knew nothing to the contrary until a very short time before making this motion, when it was ascertained that the papers had never been sent up, or the cause docketed in the court; that acting under the belief that the case was in court, the defendant had retained counsel to

attend to it, and supposed that he had done so, and would certainly see that the appeal was properly sent up and docketed; and that the defendant has a valid defence to the action.

W. H. Young, of counsel for defendant, also filed his affidavit, stating that at spring term, 1881, acting under the belief that the papers in the case had been sent up by the justice, and that the cause was then in court, he caused witnesses to be summoned and in attendance at that time, but the case was not called.

The plaintiff filed his affidavit in answer to the motion, without however materially varying the facts, and he insisted that as the defendant company had allowed three full terms of the superior court to pass without moving in the matter, it had lost the right to be relieved by its own laches.

At July special term, 1882, the plaintiff moved to dismiss the *recordari*, when the defendant asked the court to find the facts to be as set out in the affidavits of its agent and attorney, which the court declined to do, but gave judgment dismissing the proceeding and setting aside the *supersedeas* that had been granted, and from this judgment the defendant appeals.

Mr. G. B. Harris, for plaintiff.
Messrs. Hinsdale & Devereux, for defendant.

RUFFIN, J. If, as we suppose, His Honor's ruling rested upon the idea that, conceding the facts to be as alleged by the defendant, they furnished no excuse for its laches or grounds for the relief asked, we feel constrained to give it our concurrence.

In *Webb* v. *Durham*, 7 Ired., 130, it was held that whenever a writ of *recordari* was asked for, as a substitute for an appeal, the application should be speedily made; and that any delay, after the earliest moment in the party's power to apply, must be satisfactorily accounted for.

It was also held in *Hahn* v. *Guilford*, 87 N. C., 172, that an appeal meant an appeal to the *next term* of the appellate court, and that it was the duty of the party to see that the justice

transmitted the case; and if not done, to move promptly, and at the very first term, for a writ of *recordari*.

So far from accounting for the delay of this defendant, the facts show it to have been positively negligent and remiss, in that, three terms were allowed to pass without its taking the pains to know that its appeal had been docketed. That an attorney had been employed to conduct the defence, furnishes no sort of an excuse for such remisness as this. The neglect of counsel will sometimes be accepted as an excuse, if it relates to a matter purely professional, and which the party cannot perform for himself; but never, when he is capable of acting for himself and by himself. This distinction is clearly drawn in *Bradford* v. *Coit*, 77 N. C., 72, and it would be singular, indeed, if it were not so, or that a party should be excused for not doing that which he ought to have done and might have done, simply because he had trusted to another to do it for him.

There are other grounds upon which the judgment below might have been made to stand, but the laches of the defendant is sufficient, and we prefer to put our approval upon that alone, so that it may be understood what degree of diligence is expected in all such cases—it being just the same which this court exacts of parties who apply here for writs of *certiorari*. *Brown* v. *Williams*, 84 N. C., 116; *Hahn* v. *Guilford*, *supra*.

No error. Affirmed.

JAMES H. SCROGGS, Adm'r, v. MARY M. ALEXANDER and others.

Appeal—Certiorari.

A *certiorari* will not be granted, first, where the agreement to waive the code-rule of making up case is oral and denied by either party; or secondly, where the terms thereof are to be decided by conflicting affidavits—except where the waiver can be shown by the affidavits of the appellee, rejecting those of the appellant.

(*Walton* v. *Pearson*, and cases cited, 82 N. C., 464, approved).

SCROGGS *v.* ALEXANDER.

PETITION for *certiorari*, as a substitute for an appeal, filed by defendants and heard at February Term, 1883, of THE SUPREME COURT.

Messrs. Robbins & Long, for plaintiff.
Messrs. Reade, Busbee & Busbee, for defendants.

ASHE, J. The petition alleges, that in 1873 the plaintiff filed a petition in the probate court of Iredell county against all the defendants, for a final settlement of his administration of the estate of Adam R. Simonton, deceased, of which he was administrator *de bonis non* with the will annexed.

There was an appeal from the judgment of the probate court to the superior court, in term, and at fall term, 1882, judgment was rendered by said court against the petitioner, Mary M. Alexander, who appealed from the same, and the following appears of record:

"Fall term, 1882—Judgment: from the judgment, Mary M. Alexander appeals: appeal granted: notice of appeal waived: bond fixed at $50. Plaintiff appeals from the judgment of the court: appeal granted and notice of appeal waived: bond fixed at $50.

The defendant, Alexander, filed a bond for the appeal during the term, which was accepted as amply good, and is on file in the clerk's office, and through her counsel, R. M. Allison, proposed making up the case, when the court informed him, "never mind, the court will fix up the case all right." The counsel, being thrown off his guard, did not tender a case to plaintiff in strict accordance with the Code, knowing that the rulings of the court on the exceptions, *pro* and *con*, contained in the record, were all that could be put in the case.

The petition further states that in November, 1882, Judge Avery, who rendered the judgment, visited Statesville to try a writ of *habeas corpus*, and then informed her counsel (Allison) that he would make up the case for the supreme court, and the

counsel relied upon the promise until he received, on March 10, 1883, a postal card from Judge Avery, stating that from letters received from several attorneys, the right of appeal was lost by her failure to give notice and to tender a case, which is not true, only as to tendering the case, for the reason as above stated.

The statements in the petition were supported by the affidavit of R. M. Allison, the defendant's counsel, who states the same facts, in substance, as those set forth in the petition.

Scroggs, the plaintiff, stated in his answer to the petition, that the final judgment rendered by Judge Avery was appealed from both by the defendant, Alexander, and himself, as will appear by reference to the record; that his appeal was perfected according to the provisions of the Code, his said appeal having no reference to any question between him and said defendant or the other distributees of the estate, but solely to a question incidentally arising between himself and J. H. Stephenson, administrator of Joseph F. Alexander, late executor of Adam R. Simonton, which question having been compromised between them, his appeal was withdrawn by consent of Stephenson—they being the sole parties interested therein. But the appeal of the defendant, Alexander, which he is informed and believes involves questions affecting the interests not only of himself as administrator *d. b. n., c. t. a.*, but also of the said co-distributees, was never perfected according to law, by a service of the statement of the case upon the respondent, or his attorney at any time whatever, as he is informed and believes; that no waiver of the code-provisions in reference thereto, and no consent that the case might be made up by the judge himself, or in any other manner than the Code requires, was ever made or given by him or his counsel; that any averment which may be made in behalf of the petitioner that the above waiver was made or consent given, or that the judge proposed to make up the case and the same was assented to, this respondent positively denies; and he is also informed and believes that no such assent was given by any of the other appellees or their counsel.

The respondent further stated that one inducement to compromise with Stephenson was, that he was informed and believed that from the long delay of defendant, Alexander, her appeal had been withdrawn or forfeited; and that the withdrawal of his own appeal would expedite the settlement of the estate.

The answer of the respondent is sustained in every material statement by the affidavits of M. L. McCorkle, B. F. Long, T. S. Tucker and D. M. Furches, his attorneys.

The appeal of the defendant having been lost by her not complying with the requirements of the Code in making up cases on appeal, the question arises, has she brought herself within any exception to the rigid rule of code-practice, which it is insisted by the plaintiff should be enforced. Some exceptions have been recognized by this court, otherwise than by the special agreement of counsel as required by the statue, but the rule is never relaxed in a case where the agreement for a deviation from the statutory mode of appeal is oral and is denied by either party, or the terms thereof are to be decided by conflicting affidavits. *Wade* v. *Newbern*, 72 N. C., 498; *Adams* v. *Reeves*, 74 N. C., 106; *Rouse* v. *Quinn*, 75 N. C., 354. The only exception is where the waiver of the code-rule can be shown by the affidavits of the appellee, rejecting those on the part of the appellant. *Walton* v. *Pearson*, 82 N. C., 464; *Adams* v. *Reeves*, *supra*.

There is no such waiver to be gathered from the answer of Scroggs, the plaintiff, or from the affidavit of either of his counsel; but on the other hand, a positive denial that there was any such waiver. We think the plaintiff had the right to insist upon a strict compliance with the requirements of the Code, unless the defendant could show that the circumstances mentioned in the petition bring her case within some of the admitted exceptions, and we are of opinion they do not. The *certiorari* is therefore refused.

PER CURIAM. Motion refused.

ADDISON WILEY and others v. A. W. LINEBERRY and others.

Appeal—Certiorari.

1. A *certiorari* will be granted, as a matter of right, where it appears that the appellant has been deprived of his appeal by no laches on his part, but by the conduct of the opposing party, as shown here.
2. The court suggest that if any difficulty arises in procuring a statement of the case, parties should cause the record proper to be filed and the case docketed, so that they may be in a position to ask the aid of the court in perfecting the appeal without delay.

(*Skinner* v. *Maxwell*, 67 N. C., 257, cited and approved).

PETITION for *certiorari* heard at February Term, 1883, of THE SUPREME COURT.

Messrs. Dillard & Morehead and *Hinsdale & Devereux*, for plaintiffs.

Messrs. Scott & Caldwell, for defendants.

RUFFIN, J. This cause was tried at fall term, 1882, of Guilford superior court, and the verdict and judgment being in favor of the defendants, the plaintiffs appealed to this court.

Notice of appeal was given in open court, and the parties were allowed thirty days to prepare the case on appeal, and afterwards an order was made, upon proper certificates and affidavits, permitting the appeal to be taken without security.

The cause was not docketed at the October term of this court, until the end of the week assigned to the 5th judicial district, when the appellee caused a transcript of the record to be docketed and moved the court to dismiss the appeal at the costs of the appellant, and thereupon an order to that effect was made.

The plaintiffs now move for leave to docket their appeal and for a writ of *certiorari* to bring up the record, and in support of their motion offer the affidavits of their counsel, Mr. Robert

R. King, and the clerk of said court, as tending to explain their failure to docket the cause in due time.

Mr. King in his affidavit states that, knowing that his clients had been allowed to appeal *in forma pauperis*, and that therefore the clerk would get no fees for his services in the matter, he proposed to take upon himself the labor of preparing the transcript, all except the certificate, which was assented to by that officer; that with this view, and in time sufficient to have had the transcript filed as required by the rules of this court, he called at the clerk's office for the papers in the cause, but was told that they were not there. He then made a like application for the papers at the office of the attorneys for the appellees (only one of whom however was present), and was informed that the papers were all there except *the case on appeal*, and that had been lost and could not be found. That the attorney also informed him that he was then engaged in making out a transcript of the case, and had it partially done. He then proposed, with the assent of the attorney, to take his work and complete it, and to send it on for the appellants, but this not being agreed to, he took the papers, again being assured that they were all there except the statement of the case as signed by the judge. Not doubting that the missing paper would be found, he went immediately to work to make out the transcript, and did make it out so far as he could without that paper. He then made another application to the clerk for it, and upon learning that it had not yet been found, caused search to be made for it, but without availing anything. While engaged in making the search, the time prescribed by the rule, within which the transcript should be docketed, passed, without his being able to complete and forward it to this court. Thus matters stood until the end of the October term of this court, and after the appellees had caused a transcript to be filed and the appeal dismissed (which transcript had been prepared by their counsel, and contains an exact copy of the paper said by him to have been missing), when the case as signed by the judge was

found by the clerk upon his table, though when and by whom placed there that officer did not know.

The clerk in his affidavit simply, but fully confirms the statements of Mr. King, as to his having applied for the papers and their absence from the office; the fact that they were said to have been found at the attorneys for the appellee, all except the statement of the case prepared by the judge; and the appearance of that paper, for which he could not account, upon his table after the plaintiffs' appeal had been dismissed.

The defendants offer no opposing testimony, nor do they attempt to explain the case as made by the affidavits offered by the plaintiffs.

Taking the facts to be as set forth in those affidavits, the court cannot for a moment hesitate to grant to the plaintiffs the benefit of the writ they ask for. It would be a reproach to the law, and bring shame upon the courts, if they were to permit parties who had themselves been guilty of no laches to be deprived of their appeal in any such manner.

This is no ordinary case in which the court is asked in its discretion to set aside its order dismissing an appeal, and therefore it does not fall under Rule 42, which requires that before such an order shall be made, the appellant whose appeal may have been dismissed shall repay to the opposing party his costs incurred in the matter. These plaintiffs base their claim to the aid of the court upon such a state of facts as entitles them to it, as a matter of right, and not in the discretion of the court, and therefore the court declines to impose any such terms upon them. *Skinner* v. *Maxwell*, 67 N. C., 257.

We take occasion, however, to suggest, that in a case like the present, and in all others in which there should be any difficulty in procuring a statement of the case on appeal, it is best that parties should at least forward and cause to be docketed a transcript of the record proper of the case. In this way, they will secure a footing in this court, and can always have its aid in per-

fecting their appeals, and it may be that the court will hereafter insist upon this course being taken.

The clerk of this court will at once docket this cause and will issue the *certiorari* as prayed for by the plaintiffs.

Judgment accordingly.

L. H. HORNTHAL & BRO. v. WESTERN INSURANCE COMPANY.

Insurance.

1. The plaintiff applicant for insurance made an approximate estimate, from memory, of amounts of insurance then existing on the property, to the defendant company's agent, who reported a definite sum to the company; the agent had authority to act upon verbal statements, and a policy was issued; *Held*, that the representation was not false, and that plaintiff is not responsible for the error of the agent in his report to the company.

2. The agent's actual knowledge of the additional insurance in this case, is in law the knowledge of the principal, and a waiver of the requirement prohibiting other insurance without the written consent of the company.

(*Collins* v. *Ins. Co.*, 79 N. C., 279; *Argall* v. *Ins. Co.*, 84 N. C., 355, cited and approved).

CIVIL ACTION tried at Fall Term, 1882, of BEAUFORT Superior Court, before *Gilliam, J.*

The plaintiffs' action is upon a fire insurance policy issued by the defendant company upon a stock of goods subsequently burned, and the recovery is resisted upon the grounds:

1. There was a false representation, having the force of a warranty, that the amount of previous insurance on the property was twenty-four thousand dollars, while it was in excess of that sum.

2. There were insurances afterwards taken out on the same property in other companies, without the written endorsed consent of the defendant thereto.

The cause was referred by consent, to W. B. Rodman, to ascertain and report the facts, whose findings were to be final on them, and his conclusions of law subject to exception and review.

The facts found by the referee, so far as material to the present inquiry, are in substance as follows:

On June 6th, 1880, the plaintiffs, through one of the members of their firm, made application to one Montgomery, an agent of the defendant company, for additional insurance upon their stock of goods in the store at Plymouth, in the sum of two thousand dollars, stating at the time that there was other insurance of twenty-four thousand dollars, or thereabout, the policies for which were on deposit in New York with an insurance agent and broker, and he, the applicant, could not state the amount accurately; it might be less than that sum, or more, or even as much as thirty thousand dollars. The agent replied, "Be as accurate as you can as to the amount; as to the names of the companies, it makes no difference"; and the applicant said, "I think it is twenty-four thousand dollars."

The insurances then covering the property, as it was afterwards ascertained, were in value twenty-eight thousand seven hundred and ninety-one dollars.

On the same day, the same partners also applied to the said Montgomery, who was also agent for other companies, for insurance in two of them upon the same goods in an additional sum of two thousand dollars in each. The application for insurance in all these companies was entertained, and in a few days thereafter policies were issued by the defendant and by one of the other companies, and sent through the mail and received by the plaintiffs, and a few days later a policy from the remaining insurance company—each being in the same sum, and that of the defendant being the policy now in suit.

There was no written or printed application signed by the acting plaintiff for his firm, and the policies were procured by the agent and issued upon the verbal representations mentioned.

The goods at the time of insurance were worth fifty thousand

dollars; and when destroyed by fire on January 31st, 1881, were of the value of thirty-nine thousand three hundred and sixty dollars. Deducting therefrom the value of the goods saved and of those not covered by insurance, the actual loss on those insured amounts to thirty-five thousand nine hundred and fifty-six dollars and fifty-two cents.

The referee deduces as propositions of law applicable to the subject matter of controversy, as follows:

The plaintiffs' statement in respect to the amount of existing insurances was qualified and an approximate estimate from memory, and in its qualified sense is true. The error, in reporting to the defendant an absolute and definite sum, is that of the agent only, for which the plaintiffs are not responsible. The agent had authority to accept and act upon the verbal statement of the plaintiff, and his principal is bound thereby. The cotemporaneous applications to the common agent of the three insuring companies for separate policies of the same amount in each, and the subsequent issue and delivery of them thus known to the agent, are in legal effect known to the principal, and the action predicated upon this knowledge is a waiver of compliance with the clause in the policy which prohibits a subsequent insurance on the same property without the consent in writing of the company endorsed thereon. The plaintiffs are therefore entitled to judgment.

The defendant excepts to the several conclusions of law reported by the referee, and, his exceptions being overruled and judgment rendered for the plaintiffs, appeals to this court.

Messrs. Pruden & Shaw and *Jas. E. Moore*, for plaintiffs.
Mr. Geo. H. Brown, Jr., for defendant.

SMITH, C. J., after stating the above. The clauses in the policy which, it is claimed, vitiates and annuls the contract of insurance upon the facts ascertained are these:

1. The application, plan, survey, or description of the property

herein insured, referred to in this policy, shall be considered a part of this contract and a warranty by the assured during the time this policy is kept in force. * * * If the assured shall have or shall hereafter make any other contract of insurance, whether valid or not, on the property hereby insured, or any part thereof, without the consent of this company written hereon * * * * then in every such case this policy shall become void.

6. It is further understood and made part of this contract, that the agent of this company has no authority to waive, modify or strike from this policy any of its printed conditions, nor is his assent to an increase of risk binding upon the company, until the same is endorsed in writing on the policy, and the increased premium paid; nor, in case this policy shall become void by reason of the violation of any of the conditions hereof, has the agent power to revive the same. * * * * * * * *

The exception, based on the additional and alleged subsequent insurance in the two other companies represented by the agent, has no support in the facts ascertained and reported by the referee. The applications were simultaneous and all anterior to the issuing of the defendant's policy, and hence not within the scope of the inhibitory clause. But if the policies bore the relation of prior and posterior in the date of their issue, that of the defendant was issued and delivered to the plaintiffs with actual knowledge of the fact on the part of the agent, and constructive knowledge of his principal, and must be deemed to have been done with full assent to the proposed increase, and hence the company has waived a strict compliance with the requirements of this provision for forfeiture.

The citations made in the argument for the plaintiffs from that valuable treatise, May on Insurance, fully sustain this view.

A general agent, such as the referee finds Montgomery to have been in the transaction, represents his principal in it and may bind him by any act or agreement fairly within the apparent cope of his employment; and this, although there may have

been limitations put on his authority unknown to those with whom, in such capacity, he may have dealings. Thus he may bind his company by a parol contract, § 128; notice to him is notice to his principal, and his knowledge is the knowledge of the company, §§ 131, 132, 142, 143; Wood on Ins., §§ 394, 388; he may waive a forfeiture and dispense with what would otherwise cause it. May on Ins., § 136; Wood on Ins., §§ 391, 393.

A recent decision in the supreme court of the United States (*Insurance Co.* v. *Wilson*, 13 Wall., 222) is so direct and clear upon the point, that it seems wholly needless to search for other authorities in the state courts or in the works of elementary writers on the subject. This was a case of life insurance, and in answer to an inquiry as to the age and cause of death of the mother of the applicant, both himself and wife said that they neither of them knew at what age or from what disease the mother died. An aged woman present professed to know, and being questioned by the agent, stated that she, the deceased, was forty years of age and died from fever. This answer was entered in response to the inquiries by the agent, the applicant, and his wife, neither of them affirming the statement, nor assenting thereto, and the application containing this answer was afterwards signed by him. It was in proof that the mother died much earlier in life and from consumption, and the company sought to avoid the contract of insurance for this false information upon which the policy issued.

We prefer to reproduce extracts from the able opinion of Mr. Justice MILLER upon the merits of this defence, rather than indulge in comments of our own upon it. Detailing the circumstances under which the information was obtained and inserted in the blanks of the signed application, he says, "it is clear that for the insurer to insist that the policy is void because it contains this statement, would be *an act of bad faith and of the grossest injustice and dishonesty.* And the reason for this is, that the representation was not the statement of the plaintiff, and that

the defendant knew it was not when he made the contract, and that it was made by the defendant who procured the plaintiff's signature thereto."

And again, in speaking of the attempt to make their own soliciting agents, the agents for many purposes of the assured, he continues: "But to apply this doctrine in its full force to the system of selling policies through agents, which we have described, would be a snare and a delusion, leading as it has done in numerous instances to the grossest frauds, of which the insurance companies receive the benefits, and the parties supposing themselves insured are the victims. The powers of the agent are *prima facie* co-extensive with the business intrusted to his care, and will not be narrowed by the limitations not communicated to the person with whom he deals. An insurance company, establishing a local agency, must be held responsible to the parties with whom they transact business, for the acts and declarations of the agent within the scope of his business, as if they proceeded from the principal."

The same doctrine thus forcibly declared has been adopted and announced by this court in the cases of *Collins* v. *Ins. Co.*, 79 N. C., 279, and *Argall* v. *Ins. Co.*, 84 N. C., 355.

The representations of the plaintiffs are not warranties in any sense which can infect and invalidate the contract. May, § 161. They simply express the opinion or memory of the partner, are in themselves but an approximate estimate of the amount of insurances, and, unless intentionally false, which is not suggested, cannot enter as a vitiating element in the contract of insurance. As such, the representation as to value was given and received, and the policy made out and delivered.

What has been said disposes of all the exceptions, and necessarily results in sustaining the conclusions of the referee and the rulings of the court in affirming them. There is no error, and judgment must be entered for the plaintiffs.

No error. Affirmed.

S. GRANT v. M. MOORE.

Injunction.

An injunction will not be granted where the matter is involved in another pending suit between the same parties, in which relief can be there had. A party in such case is not allowed to seek redress from the action of one court through the conflicting action of another court, or in a different and distinct proceeding in the same court.

(*Murrill* v. *Murrill*, and cases cited, 84 N. C., 182; *Chambers* v. *Penland*, 78 N. C., 53; *Parker* v. *Bledsoe*, 87 N. C., 221, cited and approved).

MOTION for injunction, in an action pending in DUPLIN Superior Court, heard at Chambers in Clinton on the 22d of January, 1883, before *McKoy, J.*

The defendant in this action, as plaintiff in another, prosecuted against the present plaintiff, who is the defendant in that, at a special term of Duplin superior court held in 1882, recovered judgment for the possession of the land in dispute between them, and for his costs of suit with a stay of execution for ninety days, during which certain referees named should pass upon the value of rents, ascertain payments made, and the residue of the purchase money due upon a contract, and run a divisional line, unnecessary to be stated with greater particularity, in order to a full adjustment of unsettled matters connected with said contract. This judgment was rendered under a consent to submit the controversy to the presiding judge, who was "to render such judgment as he shall deem proper."

The referees failed to act within the limited time, and execution was thereafter sued out by the defendant, Moore, and placed in the sheriff's hands, to restrain whose proceeding under it, the present action is commenced by the plaintiff and a preliminary injunction asked.

Numerous affidavits were introduced and read at the hearing of the application, for and in opposition to it, the relief being demanded on the ground that the plaintiff was in no default for

the inaction and delay of the referees, which were wholly attributable to themselves.

His Honor upon argument before him on January 22d, 1883, declined to grant the injunction, "for the reason that the plaintiff has a remedy for the matters of which he complains, by a motion in the original cause." From this ruling the plaintiff appeals.

Mr. H. R. Kornegay, for plaintiff.
Messrs. Allen & Isler and *O. H. Allen*, for defendants.

SMITH, C. J., after stating the case. The action of the court in refusing to entertain the application for an interference with the proceedings in another pending suit between the same parties, with reversed relations, when full relief can be there had, is fully sustained by the cases cited in the argument for the appellee, and the settled practice, we had hoped, was well understood. The references are *Council* v. *Rivers*, 65 N. C., 54; *Faison* v. *McIlwaine*, 75 N. C., 312; *Chambers* v. *Penland*, 78 N. C., 53; *Lord* v. *Beard*, 79 N. C., 55; *Murrill* v. *Murrill*, 84 N. C., 182; *Parker* v. *Bledsoe*, 87 N. C., 221. We recall what was said in *Chambers* v. *Penland*, and reaffirmed in slightly variant language in *Parker* v. *Bledsoe*.

"While the action is pending, relief can be obtained by a defendant, aggrieved by a judgment, by his applying to the court wherein it was rendered for a modification, and meanwhile for a *supersedeas* or other order, arresting proceedings until the application can be heard. He is not allowed to seek redress from the action of one court *through the conflicting and repugnant action of another court, or in a different and distinct proceeding in the same court.*"

Under our former system redress against an inequitable judgment or an unconscientious use of it, was afforded by a personal mandate addressed to the party, restraining and controlling his conduct, but not by a direct interposition in the cause. Now the

correction is sought in a modification of the judgment itself, and in instructions put upon the issuing of process to enforce it, the injunction or restraining order operating only as a suspension of action until the application can be heard. The judgment is affirmed and this will be certified.

No error. Affirmed.

WESTERN NORTH CAROLINA RAILROAD COMPANY v. GEORGIA & NORTH CAROLINA RAILROAD COMPANY.

Injunction.

An injunction will not be granted upon the facts of this case, as no injury will result to the plaintiff by a denial of the application.

(*Mfg. Co.* v. *Fox*, 4 Ired. Eq., 61; *Frizzle* v. *Patrick*, 6 Jones' Eq., 354; *Thompson* v. *McNair*, Phil. Eq., 121; *Dunkart* v. *Rinehart*, and cases cited, 87 N. C., 224; *Peebles* v. *Com'rs*, 82 N. C., 385; *R. R. Co.* v. *Com'rs*, *Ib.*, 259, cited and approved).

MOTION for injunction in an action pending in WAKE Superior Court, heard at Chambers in October, 1882, before *McKoy, J.*

The plaintiffs allege that under the provisions of the act incorporating the Western Division of the Western North Carolina Railroad Company, to which the plaintiff company under the name of the Western North Carolina Railroad Company has succeeded, and other acts of legislation relating thereto, a route westward from Asheville towards the Tennessee boundary, passing over a locality known as "Red Marble Gap," has been surveyed and located, and thus an inchoate prior right to construct the railroad thereon acquired, to become perfect upon payment of damages to be assessed for the appropriation of the land. They further allege that the defendant company, the Georgia and North Carolina Railroad Company, organized and operating also

under the laws of the state, has taken possession of a portion of the land traversed by the line of the projected road, in process of construction by the plaintiff, and claiming a right to locate its road thereon, under a deed or license from the proprietor of the land, is engaged with a large force of workmen in making excavations and levelling, with intent to put its superstructure thereon for the rail track when filled for the purpose.

The object of the action is to have the defendant company, its officers and agents perpetually enjoined from interfering in any way with the land thus previously taken and appropriated to the use of the plaintiff company, and upon a preliminary application to the judge on July 2d, 1882, he decided to issue a restraining order to be in force until it could be heard, and directed that cause be shown by the defendant, at Raleigh, on August 21st, thereafter (the hearing having been postponed on that day to October 11th) why the injunction asked should not be granted.

The parties appeared and filed numerous affidavits and exhibits, those of the parties in the form of complaint and answer being used as such, bearing generally upon the conflicting claims asserted by each to locate its line of railway over the disputed territory, to which it is not necessary to advert in detail.

His Honor upon the evidence, after finding the facts, ordered and adjudged that the Georgia & North Carolina Railroad Company, and its officers, agents and employees be enjoined till the hearing of the cause, from occupying, working or using, as a road-bed or track, any part of "Red Marble Gap" on the surface that would be necessary to put the centre of their track where the excavation is made, at least 15 feet from the centre of the track of the Western North Carolina Railroad Company, when run on the line with which it has entered the gap, and heretofore been marked and surveyed, and so as to make its slopes sufficient and not less than 25 feet from the centre of the gap, unless it should be made to appear to the court hereafter, that owing to the nature of the gap it may be necessary to modify this order so as to allow the centres of the two tracks to approach nearer to

each other, and an injunction conforming to the judgment was directed to issue, on the plaintiff company's filing a bond in the sum of $2,000, intended, as we suppose, though such is not its declared object, to provide an indemnity for the defendant company against any damages it may sustain in consequence of the wrongful suspension of its operations at this point. From this ruling the defendants appeal.

Messrs. D. Schenck and *Reade, Busbee & Busbee*, for plaintiff.
Messrs. Battle & Mordecai, for defendant.

SMITH, C. J., after stating the above. From the evidence it seems that the work of construction on the plaintiffs' western extension of its road has not reached by many miles, nor is it likely to reach for a long time to come, the locality of the gap where the defendant company is at work, and whose work is interrupted by the restraining order, nor is the possession of it required for any present use of the plaintiffs.

Moreover, if we understand the operations there in progress, preparing the surface for the laying of a track, instead of being injurious, in case of an ultimate adjudication in favor of the plaintiffs' complaint, it will ensue to their advantage, because it is in part the very same work the plaintiff company would have to do in preparation for laying its wider track. If it were to some extent an injury, the damage would not be irreparable, since the proved solvency of the defendant company would insure adequate compensation.

In the other aspect of the case, the effect of the restraining order upon the defendant company, should its claim be held to be superior to the other, might be very injurious in interrupting the prosecution of another public enterprise, and entailing damages for which money might be a very inadequate compensation.

So then, the denial of the injunction *now* cannot hurt the

plaintiff company, for its own work is not interfered with and its engineering surveys and estimates go on without interruption, and when an actual obstruction is met, if it occurs before the final trial of the case upon its merits, it will then be time for the plaintiffs to ask for the exercise of the restraining power of the court in order that its work may go on. It is at least unnecessary, if not premature, to ask for it so long in advance. If the purpose of asking for the intermediate injunction is to obtain the opinion of the court upon the question of priority of right to lay the track upon and over the gap, of the contesting companies, we should refrain from giving it, since the motion is heard upon *ex-parte* evidence, without those safe guards which the law has provided, in requiring in most cases the personal presence of the witness and affording, in all, opportunities for cross-examination, conditions so important to the development of truth and detection of falsehood in trials before a jury, and under the rules that govern them.

We only proceed in the inquiry so far as to see that there is a reasonable claim and right sufficient to call for and authorize the exercise of the power possessed, to take care of a disputed fund in danger of being lost or impaired, or to prevent an irremediable threatened injury.

The facts of the present application do not bring it within the principle upon which a court of equity acts in affording such relief, nor do they warrant our intervention in the controversy at this stage of its progress, and we leave it, where it should be left, to the determination of a jury.

These views are in consonance with judicial practice as established by our own adjudications, to some of which we refer in closing the opinion. *Deep River Man. Co.* v. *Fox*, 4 Ired. Eq., 61; *Frizzle* v. *Patrick*, 6 Jones' Eq., 354; *Thompson* v. *McNair*, Phil. Eq., 121; *McCormick* v. *Nixon*, 83 N. C., 113; *Dunkart* v. *Rinehart*, 87 N. C., 224; *Peebles* v. *Commissioners*, 82 N. C., 385; *Railroad* v. *Commissioners*, *Ibid*, 259.

To the same effect are High on Injunctions, §§ 35, 417, 599; and *Essex County* v. *Blair*, 1 Stockton (N. J.), 635.

There is error in issuing the injunction under the circumstances, and the order therefore is reversed. Let this be certified.

Error. Reversed.

WILLIAM P. DAY v. JAMES H. STEVENS and another.

Partnership—Agreement to cultivate land—Landlord and Tenant.

1. A partnership exists, where there is a common liability for losses and a common participation in the profits, as profits, after the payment of expenses.
2. A partnership, regulating the relations and interests of the members among themselves, is not the same as one formed and acting as such in its relations to others.
3. Where the landlord furnishes the land and teams and feed for them, and the tenant supplies the labor and provisions for the laborers, in the cultivation of a crop—the gross product to be divided between them, without any account of expenditures made by either; *Held*, that the agreement does not constitute an agricultural partnership.
4. The statute expressly provides that the lessor, by reason of his receiving a share of the crop, shall not be regarded as a partner of the lessee.
5. *Curtis* v. *Cash*, 84 N. C., 41, explained and corrected.

(*Mauney* v. *Coit*, 86 N. C., 463; *Curtis* v. *Cash*, 84 N. C., 41; *Reynolds* v. *Pool*, *Ib.*, 37 and 37 Amer. Rep., cited and commented on).

CIVIL ACTION tried at Spring Term, 1883, of DURHAM Superior Court, before *Gilmer, J.*

Verdict and judgment for plaintiff, appeal by defendants.

Messrs. J. W. Graham and *R. C. Strudwick*, for plaintiff.

Mr. W. W. Fuller, for defendants.

SMITH, C. J. The complaint alleges that defendant entered into an agreement and formed an agricultural copartnership for working a farm (belonging to the defendant, James H. Stevens, and situated in Sampson county), for the year 1871, and that on October 8th of that year, they contracted with the plaintiff to sell and deliver to him, at Durham, the entire crop of tobacco raised thereon at the price of $16 for every one hundred pounds.

The tobacco not being delivered, the present action was instituted on December 21st, 1881, to recover compensation in damages for an alleged breach of obligation.

The defendants deny that any copartnership was constituted or intended to be constituted between them by their agreement for the cultivation of the land; that any such contract was made with the plaintiff; that the plaintiff was ready to comply with its terms if any such was made; or that any breach has been committed subjecting them to the plaintiff's demand for damages.

Several issues involving the different matters in controversy were prepared and submitted to the jury, of which it is only necessary, in the view which we have taken of the case, to set out the two following:

1. Were the defendants, James H. Stevens and James H. Burch, at the time mentioned in the complaint, partners, as farmers, manufacturers or merchants?

2. Was the contract mentioned in the second allegation of the complaint entered into between the plaintiff and defendants, in manner and form as therein stated?

Upon the trial evidence was introduced to show that early in the year 1881, the defendants entered into a mutual agreement for cultivating the farm, in which Stevens was to allow Burch to work the land and raise the crop, and to furnish him teams and feed for them to be so used, while Burch was to supply the required labor and provisions for the laborers to be employed, and each was to have an equal share of the produce made on the farm for that year.

The plaintiff contended, while the defendants denied, that this

agreement constituted a copartnership between the parties in their relations to others, or created an agency, in the exercise of which, each could dispose of the whole crop and bind the other by the contract; and the defendants further insisted that if by virtue of their agreement a copartnership did in law exist between them, the contract of sale made by Burch was not within the scope and purview of the association, so as to include the moiety of the product of the defendant, Stevens.

The court instructed the jury, that the effect of the agreement shown in evidence would be to create a copartnership for agricultural purposes, and that the contract of sale made by Burch was the contract of the firm, and equally binding on both. Under this charge the jury found both the issues in the affirmative.

The plaintiff's counsel undertook in his argument to separate these findings, and urged that inasmuch as the response to the second issue establishes the contract as actually entered into by both defendants, the error, if such there was, in the effect ascribed to the agreement between the defendants, is harmless, and the plaintiff would be entitled to judgment disregarding the finding upon the first issue.

We do not assent to this proposition, nor see the force of the reasoning resorted to in its support. The issues are not thus severable, but closely connected and dependent, the one upon the other. If partnership relations were formed, the contract of sale proved to have been made by Burch was in law the contract of both, and this result follows, though Stevens had no participation in making it, and never afterwards gave it his assent or approval. The existence of a partnership involves an agency in each member to act for all in the name of the firm, within the reasonable scope of the purposes and aims of the association. The instruction complained of tended to mislead the jury in rendering a verdict fixing the contract upon both, if in fact one of them was not a party to it in its inception or by a subsequent

ratification and no copartnership was formed under and by virtue of their agreement.

We are thus brought directly to the question, whether the construction put upon the contract for farming operations, that the defendants thereby became partners, is correct.

In our opinion the interpretation put upon the contract is not warranted by its terms, and the defendants were not by this association made copartners in their relations to others, and in this respect the charge is erroneous.

A copartnership is thus defined by Mr. Greenleaf: When there is a community of interest in the property, and also a community of interest in the profit, there is a partnership. If there is neither of these, there is no partnership. If one of these ingredients exist without the presence of the other, the general rule is that no partnership will be created between the parties themselves, if it would be contrary to their real intentions and objects. 2 Greenl. Evi., § 482.

Mr. Justice STORY declares a partnership to be formed when a contract is entered into between two or more competent persons to place their money, effects, labor and skill, or some or all of them, in lawful commerce or business, with the understanding that there shall be a communion of the profits thereof between them. Story Part., § 2.

In a recent case we had occasion to speak of the essential elements in the constitution of a partnership, and used this language: A participation in the profits of the business, *as such*, involving also a common liability for losses, unless this be excluded by evidence to the contrary, as in the exceptional cases in which the profits are looked to, as a means only of ascertaining the compensation which under the contract is to be paid for the services of an employee, or some other specific obligation, many of which will be found in the note to the case of *Reynolds* v. *Pool*, 37 Amer. Rep., 609, seems to be the well settled rule for determining the existence of a copartnership in the relation

of its members to those who may deal with it and become members. *Mauney* v. *Coit*, 86 N. C., 463.

The prominent feature in such an association is a common liability for losses and a common participation in the results or profits, as profits, ascertained after payment of expenses incurred in prosecuting the joint business.

These ingredients are absent in the case before us. The owner of the land furnishes it and the horses and their feed required in the cultivation—the defendant, Burch, supplies the labor and work and the gross product or produce is to be equally divided between them without any account of expenditures made by either.

Precisely such an arrangement, which should encourage farming without subjecting the owner of the farm to the debts incurred by the person who cultivates it, seems to have been contemplated and provided for in the act of April 10th, 1869, which declares: "That no lessor of property, merely by reason that he is to receive, as rent or compensation for its use, a share of the proceeds or net profits of the business in which it is employed or any other uncertain consideration, shall be held a partner of the lessee." Bat. Rev., ch. 64, § 3. Nor will the result be different when to insure the cultivation the lessor furnishes and feeds the team used by the tenant in making the crop.

We have had our attention directed to the language employed in the opinion of *Curtis* v. *Cash*, 84 N. C., 41, in describing an association, very similar to the present, as a copartnership between the parties. The exception then under consideration was to a refusal of the court to charge that the title to the entire crop was vested in the landlord, Veazey, and it was in answer to this suggestion that the word was inadvertently used, as indicating the relations of the parties, *inter sese*, and not of their partnership relations to others. The purpose was to show that whatever may have been the antecedent relations between the lessor and lessee, consequent on their contract for working the farm, the crop having been divided, the title to the respective shares vested

in each in severalty, and the lessor committed a trespass in seizing the severed share of the tenant. But as the language employed in one aspect of the case was calculated to mislead, we avail ourselves of an early occasion, when it is pressed into service, to make the necessary explanation and correction. A partnership, as regulating the relations and interests of the members among themselves, is not the same as a partnership formed and acting as such in its relations to others. The latter may exist when held out to the world, and inviting persons to deal with it, when the association among the members may not be a partnership. It is needless to consider other exceptions, as our decision of this disposes of the appeal. There is error, and we award a *venire de novo*. This will be certified.

Error. *Venire de novo.*

S. BELCHER v. J. GRIMSLEY and others.

Landlord and Tenant—Caveat Emptor.

The statute gives a landlord the title to the crop until the rent is actually paid (whether the claim be reduced to judgment or not), and such title is not impaired by the fact that the tenant conveys the crop to a third person, who takes without notice of the landlord's claim. The rule *caveat emptor* applies.

(*Curtis* v. *Cash*, 84 N. C., 41, cited and approved).

CIVIL ACTION tried at Spring Term, 1882, of PITT Superior Court, before *Gilmer, J.*

The plaintiff complains of the conversion by the defendants of three bales of lint cotton, alleging the title and the right of possession to the same to have been in himself.

The case made by the evidence is as follows: The plaintiff, being the owner of a certain tract of land in Pitt county, rented so much thereof as would amount to a two-horse farm, to one

Butts, for the year 1879, upon the agreement that he was to have one-third of all the crops made thereon as rent—he further contracting to furnish the said Butts with such supplies as he might need during the year, the exact amount of which is not definitely stated; also, the use of an ox, and such tools as might be needed to make the crop, for all of which he was to pay a fair price.

In pursuance of this agreement, the plaintiff furnished his said tenant with supplies and other articles necessary to the cultivation of the crop, to the amount of one hundred and ninety-six dollars and some cents, and his share of the cotton raised amounted to five hundred and seventy-one pounds. After the crop matured and was picked, Butts, the tenant, carried the cotton, with the consent of the plaintiff, to a neighboring gin, where it was packed, and made ready for market. When in that condition the plaintiff gave his assent to his selling one bale, but no more. The cotton in dispute was carried from the gin to the store of the defendants in an adjoining county, and there sold to them without the consent or knowledge of the plaintiff, but without their having any notice of his claim to the same, or of its having been raised upon his land.

The three bales would average four hundred pounds each, and were worth eleven cents per pound. Butts has never paid the plaintiff the rents due him, nor for the supplies furnished, though in an action which he brought against the plaintiff before a justice of the peace, the latter pleaded the amount due to him for rent and supplies furnished, as a counterclaim, and recovered judgment therefor, which has never been satisfied.

Upon this state of facts the judge below intimated an opinion that the plaintiff could not recover, and in deference thereto he submitted to a nonsuit and appealed.

Messrs. Peele & Maynard, for plaintiff.

No counsel for defendants.

RUFFIN, J. The statute in express terms provides that when lands are rented, unless otherwise agreed between the parties, the crops raised shall at all times be deemed and held to be vested in the lessor, until the rents are paid, the stipulations on the part of the tenant all fulfilled, and the advancements made towards cultivating and securing the crop satisfied; and further, that the lessor shall be entitled to recover the possession of the crop, in an action of claim and delivery against the tenant, in case he shall remove it from the premises without his consent, or against any other person, who may get possession of and unlawfully withhold the same. Act 1876–'77, ch. 283.

As the case fails to disclose, and as we were not favored with an argument in this court for the defendants, we are at a loss to know certainly, upon what ground the judge below rested his decision. If, as we suppose may have been the case, it proceeded upon what was inadvertently said in *Curtis* v. *Cash*, 84 N. C., 41, about the effect of such an agreement in establishing the relationship of copartners between the parties, so as to give to each the absolute right to dispose of the property as to strangers, then, the responsibility for the error committed (and we are of opinion that there was error) rests with this court and not upon His Honor. As has been said by the Chief-Justice in *Day* v. *Stevens*, *ante*, 83, the remark there made, and which may have conduced to the error in this case, was not necessary to the decision rendered in that cause, and proceeded only from a desire to show that in every point of view, that could be possibly taken of the case, the plaintiff in that action was entitled to recover. It was not then, any more than now, the purpose of the court to limit the operation of the statute, which declares that a lessor of land shall not be deemed a partner of his lessee by reason of an agreement that he shall receive as rent a share in the profits of the business. Bat. Rev., ch. 64, § 3.

If on the other hand, as seems also possible, His Honor conceived, and so ruled, that because the plaintiff had reduced his claim for rents and supplies furnished, to a judgment against his

tenant individually, he had thereby lost his lien upon the crop raised, and his right to have the same in possession, we still think he was in error. Nothing short of an actual payment or a complete satisfaction of the lessor's demands, meets the words of the statute or will serve to determine his lien, or title.

Neither can the fact that the defendants had no notice of the plaintiff's claim at all impair it, in the absence of any suggestion of fraud on his part. It is a question of title, and the tenant could convey no better right to the property than he himself was possessed of. The principle of *caveat emptor* applies with full force to the case.

The conclusion of the court is that there is error in the ruling of the court below, which entitles the plaintiff to a *venire de novo*.

Error. *Venire de novo.*

CYNTHIA DUNN v. G. K. BAGBY.

Landlord and Tenant—No compensation allowed tenant for improvements.

1. The relation of landlord and tenant being established, the tenant is not entitled to compensation for improvements put upon the land during his occupation, as lessee, where he believed he was entitled to the possession for the lessor's life, when under the contract he was not; nor is the rule modified by the fact that the lessor silently acquiesced in the putting up the improvements.

2. The statute, Bat. Rev., ch. 17, § 262 *a*, is not applicable to a case like this, and does not protect the tenant from the consequences of his misconstruction of the effect of the contract.

(*Foster* v. *Penry*, 77 N. C., 160; *Parker* v. *Allen*, 84 N. C., 466; *Hahn* v. *Guilford*, 87 N. C., 172; *Merritt* v. *Scott*, 81 N. C., 385, cited and approved).

DUNN *v.* BAGBY.

CIVIL ACTION, tried at January Special Term, 1882, of LENOIR Superior Court, before *Eure, J.*

Judgment for plaintiff, appeal by defendant.

Messrs. Strong & Smedes, for plaintiff.
Messrs. Faircloth & Allen, for defendant.

SMITH, C. J. The plaintiff's action, begun before a justice of the peace under the landlord and tenant act, is to recover possession of land leased to the defendant at the expiration of the term, and on defendant's appeal was removed to the superior court.

The defendant claimed the land under a written contract of the plaintiff (which had been destroyed by fire), the legal effect of which he contended was to create in him a lease for the life of the plaintiff, this being the measure of her own estate, on an annual payment to her of two hundred dollars therefor.

Upon issues, which seem to have been submitted to the jury but are not set out in the record, nor, as the clerk states, on file, they found for the plaintiff, and among others, that the defendant was the plaintiff's tenant, holding possession under a lease from year to year, which had been terminated by a written notice on the last day of the year 1881.

Thereupon the defendant filed his petition, in which he alleges he understood that he acquired the premises under the contract for the full term of the lessor's life, and that, under the interpretation of its terms and in full belief that such was its legal import, he has constructed two barns and several tenant-houses on the premises—has cleared some thirty or forty acres for cultivation—has drained and manured the cleared land—and has made other valuable, substantial and permanent improvements, set out in more detail—all of which were done with the knowledge of the plaintiff and her silent acquiescence, while he regularly paid the annual rent. He asks the court to suspend the execution of the judgment until the increased value imparted to

the land, and the costs of these improvements, can be ascertained, and the sum he is entitled to be reimbursed for his expenditures be declared a lien on the land in favor of the defendant, and to be paid therefrom, under the provisions of the act of 1872. Bat. Rev., ch. 17, § 262 a, *et seq.*

The court denied the motion for a stay of execution, and refused to entertain the application, from which ruling the defendant appeals.

The proper practice, pointed out by RODMAN, J., in cases where a summary remedy before a justice is sought for the recovery of the possession of land withheld by a tenant whose term is expired, is, for the justice to ascertain if the relation of lessor and lessee existed between the parties, and, when the fact is established to his satisfaction, to proceed to hear and determine the controversy, since the latter is estopped to deny the title of the lessor, and it cannot be drawn in question. *Foster* v. *Penry*, 77 N. C., 160. The same course is to be pursued upon the hearing of the cause *de novo* on appeal in the superior court, when the judge must pass upon the question of jurisdiction in determining the preliminary fact of tenancy. *Parker* v. *Allen*, 84 N. C., 466. The existence and termination of the lease were established before the judge holding both courts, and the consequent verdict is thus supported, upon which the judgment rests. *Hahn* v. *Guilford*, 87 N. C., 172.

The injury then is, the relations created by the contract being those of landlord and tenant, and the error into which the defendant has fallen, arising from his misconstruction of its legal operation, can the defendant have compensation for such improvements as he has put upon the land during his occupation, as lessee, for the reason that he believed he was entitled to the possession and use during the plaintiff's life, when under his agreement he was not.

It has been repeatedly held that where, in the absence of a stipulated and fixed rent, compensation is demanded for the value of the use and occupation, or damages for detention, bet-

terments put upon the land in good faith and improving its substantial value, and not mere ornaments of matters of taste, may and should go into diminution of the claim for rent or damages, but cannot attach to the land itself. *Merritt* v. *Scott*, 81 N. C., 385. As was said in this case, the statute of 1872 was made and intended to apply to independent and adversary claims of title, so as to introduce a just and reasonable rule as to them, for which the common law did not provide. "The owner of land, who recovers it, has no just claim to anything but the land itself and a fair compensation for being kept out of possession; and if it has been enhanced in value by improvements made under the belief that he, the occupant, was the owner, this increased value he, the recovering plaintiff, ought not to take without some compensation to the other."

But no such antagonism of title exists in the present case, and the conflicting claims grow out of different interpretations put upon the same instrument, so that each possesses the same and all the information possessed by the other, and acts at his own peril. Every one is presumed to know the law, and the import and meaning of all contracts whose terms are fixed, and the statute does not protect one from the consequences of his misconstruction of its effect. It was not for betterments put on leased land, erroneously supposed by the lessee to confer upon him a life term, when the contract is for an intermediate period, which the lessor may at his pleasure put an end to on giving the necessary notice. Such a tenant can in no proper sense be said "to have made permanent improvements" while holding the premises under a title "believed by him to be good"; for he knows what title he has, and that it is not good.

The rule is not modified by the fact that the lessor remained quiet, while the defendant was thus expending his money and labor, since he, as well as she, had the same knowledge of the provisions of the agreement, and equal means of ascertaining the extent of the interest conveyed under it. It is the misfortune of the defendant to have taken erroneous advice, or to have

arrived by his own reasoning at an erroneous result, as to the effect of the agreement; but it is an error for which the court can afford him no redress.

We must therefore affirm the judgment below refusing the application, and declare there is no error.

No error. Affirmed.

WILLIAM GRANT, Adm'r, v. S. EMILY BURGWYN and others.

Judgment—Merger of Debt—Pleading—Amendment.

1. Where a judgment is recovered for a debt due by bond, the debt is thereby changed into a matter of record, and the plaintiff's remedy is upon the latter security, while it remains in force.
2. The pendency of such judgment may be set up by the defendant as a bar to another action upon the same bond.
3. A plaintiff will not be allowed to abandon the averments in the complaint' and recover upon a collateral statement of facts contained in the defendant's answer.
4. No amendment of pleading is allowed, where the cause of action as proved is wholly variant with that alleged. C. C. P., § 130.
5. Whether the court has a discretion to refuse an amendment in case of a partial or immaterial variance (?).
6. But where plaintiff voluntarily amends his complaint by entering a *nol. pros.* as to certain causes of action, it is a matter of discretion in the court, whether he shall re-instate them.

(*Platt* v. *Potts*, 11 Ired., 266; *Gibson* v. *Smith*, 63 N. C., 103; *Craige* v. *Craige*, 6 Ired. Eq., 191; *Herron* v. *Cunningham*, 1 Ired. Eq., 376; *Shelton* v. *Davis*, 69 N. C., 324; *Rand* v. *Bank*, 77 N. C., 152; *Pearce* v. *Mason*, 78 N. C., 37, cited and approved).

CIVIL ACTION tried at January Special Term, 1882, of NORTHAMPTON Superior Court, before *Graves, J.*

Appeals were taken by both the plaintiff and defendant, S. Emily Burgwyn, which for the sake of convenience the court

considered together. There were also exceptions taken to the rulings of the court with reference to the rights of the interpleader, Welsh, but as the court found it unnecessary to consider them, it is needless to state them.

The plaintiff begun his action against the defendant, Burgwyn, on the 18th June, 1877, and at the same time sued out warrants of attachment, which were returned as levied on the indebtedness of one McRae to the said defendant, amounting to $4,500, and evidenced by four bonds given to her by him.

In his complaint which was filed at fall term, 1877, the plaintiff alleged three distinct causes of action against the said defendant:

1. That on the —— day of December, 1857, she, together with one T. P. Burgwyn, executed a bond to the plaintiff's testator for the sum of $3,059, upon which two partial payments had been made, one of $500, on April 6th, 1859, and the other of $600, on January 14th, 1860, and that no other payments had been made thereon.

2. That at fall term, 1866, the said testator recovered of T. P. Burgwyn and said defendant a judgment for $2,313, of which no part had been paid.

3. That at spring term, 1866, the said testator had another judgment against the same parties for the same sum of $2,313, of which no part had been paid.

In her answer the defendant, Burgwyn, admitted the execution of the bond sued on, but averred that the same had been paid in full, and she denied that any such judgments, as those set forth in the complaint, had ever been recovered by the testator of the plaintiff.

Subsequently to this, the defendant, Welsh, was allowed by the court to interplead, and filed his claim, setting forth that the bonds attached were his own, and had been assigned to him before the levy of the attachment thereon, and for a valuable consideration. To this the plaintiff replied, denying his property in the bonds.

At spring term, 1880, the cause was called for trial, when the defendant's counsel, alleging that they were surprised at the proof of the judgments declared on, asked for a continuance of the cause, and thereupon the plaintiff's counsel said that rather than have a continuance they would enter a *nolle prosequi*, as to the plaintiff's second and third causes of action, and accordingly the same was done.

The trial was then proceeded with, resulting in a verdict and judgment for the plaintiff, from which an appeal was taken to this court, which was heard at June term, 1880, and a new trial awarded. See *Grant* v. *Burgwyn*, 84 N. C., 560.

The opinion having been certified to the court below, the plaintiff caused notice to be served upon the defendants, in September, 1881, that he would rely upon the second and third causes of action, set forth on his original complaint, and as to which a *nolle prosequi* had been entered.

At fall term, 1881, the defendant, Burgwyn, with the leave of the court, filed an amended answer, wherein she alleged that two judgments in favor of the plaintiff's testator had been rendered upon the bond sued on—one at spring term, 1866, and another at fall term in the same year—and she insisted that the bond was therefore merged in and extinguished by said judgments, so that no action could be maintained thereon.

When the cause was again called for trial at said special term, held in January, 1882, it was conceded by the plaintiff that the bond declared on, as the plaintiff's first cause of action, had been reduced to judgment as set forth in the amended answer.

After the jury were impaneled, the complaint was read as originally drawn, to which the defendants objected upon the ground that a *nolle prosequi* had been entered to the second and third causes of action, so that they no longer constitute any part of the complaint, and thereupon the plaintiff's counsel remarked that they would ask leave to amend the complaint, by restoring to it those two causes of action, but upon hearing the amended answer read, His Honor suggested that, as it admitted the judg-

ments, it supplied the defect in the complaint, and rendered its amendment unnecessary, though it could be allowed at any time if needed, and the counsel then said they would ask for it later in the trial.

His Honor then stated that as to the judgments set up in the answer, there was no issue made by the pleadings, to which both parties assented, and so there was but a single issue submitted, touching the ownership of the bonds attached by the defendant, Welsh, and to which the jury responded that he was not the owner thereof.

The defendant, Welsh, then moved to set aside the verdict, which the court declined to do.

The defendant, Burgwyn, then moved for judgment on the pleadings and admissions of the plaintiff, that she go without day, and for costs, and also that the attachment be dissolved, both of which motions were refused by the court.

The plaintiff then moved to amend his complaint, re-instating the second and third causes of action of the original complaint, to which His Honor replied that, though unwilling to set aside the verdict, he did not approve of it. Nor did he think it would be in furtherance of justice, to allow the complaint to be amended as asked, and he refused the motion to that effect.

Judgment was then rendered for the plaintiff, that he recover of the defendant, Burgwyn, the sum of $2,313.37, with interest, &c., and condemning the bonds levied on, and the indebtedness evidenced thereby, to the satisfaction of said judgment.

In the plaintiff's appeal, the error assigned is the refusal of the court to enter the amendment as asked for; and in the defendant's, the refusal to give her judgment that she go "without day," and the granting of the judgment to the plaintiff.

Messrs. W. Bagley, T. W. Mason and *Mullen & Moore*, for plaintiff.

Messrs. Thos. N. Hill and *W. C. Bowen*, for defendants.

RUFFIN, J. It seems to this court to be impossible to sustain the judgment, which was rendered in this cause in the court below, upon any principle of law or rule of pleading.

So long ago as the time of LORD COKE, in *Higgans' Case*, 6 Rep., 45, it was resolved, that whenever a judgment was recovered upon a bond, and the same remained in force, then the obligee in the bond could not have a new action upon it—the principle of the decision being, as expressed in the maxim *transit in rem judicatum*, that the cause of action is thereby changed into a matter of record of a higher nature, and the inferior remedy is merged therein.

In Brooms Commentaries, 269, this doctrine of *merger* is thus explained: "So, if judgment be recovered for a debt due by bond, the debt thus becomes, by judicial proceeding and act in law, transformed into a matter of record, upon which latter security, whilst it continues in force, the plaintiff's remedy *must be had*"; and in *King* v. *House*, 13 M. and W., 494, it was held that the pendency of such a judgment was pleadable, not in abatement merely, but as an *absolute bar* to another action brought upon the same bond.

The same rule obtains in the courts of this country:

In *Wagner* v. *Cochrane*, 35 Ill., 152, it is said that by judgment, the contract upon which it is based becomes entirely merged—loses all its vitality—and ceases to be obligatory upon the parties. Its force and effect are wholly expended, and all remaining liability is transferred to the judgment, which then becomes the evidence, and the only evidence that can be used in a court, of the existence of the original debt.

In *Platt* v. *Potts*, 11 Ired., 266, this court declared that a note upon which judgment had been taken, *was defunct*—that it no longer had any existence *as a thing*, either in fact or in contemplation of law; and in *Gibson* v. *Smith*, 63 N. C., 103, it is said, that there is *no exception* to the rule that a judgment merges the debt upon which it is rendered.

So inflexibly is the doctrine enforced by the courts, that the

supreme court of Pennsylvania declared, in *Jones* v. *Johnston*, 3 Watts and Sergeant, 276, that no expression of intention by the parties would control the law, which prohibits distinct securities of different degrees for the same debt, and no agreement on their part would prevent an obligation from merging in a judgment on it, or passing *in rem judicatum;* and in *United States* v. *Price*, 9 How., 83, a court of equity even, which pays no regard to mere fictions, refused to take cognizance of a bill seeking to enforce a bond upon which a judgment at law had been previously rendered, holding that it was merged in and extinguished by the higher security.

This being so, and the bond declared on being thus absolutely extinguished by the judgments, so that it no longer furnished evidence of any indebtedness on the part of the defendant to the plaintiff, and the court having expressly withheld its leave to declare upon the judgments, there was literally left nothing in the cause, which could authorize the judgment rendered, or in fact any judgment other than that demanded by the defendant.

It is true, indeed, that counsel, when pressed with this difficulty, assumed the ground that by pleading the judgments in the manner she did, and by admitting them to be yet unsatisfied, the defendant had supplied whatever deficiency there might otherwise have existed in the complaint, and that the plaintiff might with propriety rely upon the strength of such admissions to prove his case, and support the judgment of the court: and for this he cited several authorities. A reference to them, however, fails to justify any such inference as is attempted to be drawn from them. On the contrary, the general rule, whether under the new or the old procedure, is, that relief must be given according to the allegations contained in the pleadings and the proofs offered in support of them; and that the latter must not only show that the plaintiff is entitled to some relief, but that he is entitled to it upon the ground on which he has placed his claim. *Craige* v. *Craige*, 6 Ired. Eq., 191; *Herron* v. *Cun-*

ningham, 1 Ired. Eq., 376; *Shelton* v. *Davis*, 69 N. C., 324; Pomeroy on Remedies, 549.

In *Rand* v. *Bank*, 77 N. C., 152, the very point was made, and it was held by the court that a plaintiff could not be allowed to abandon the averments of his complaint, and recover upon a collateral statement of facts set out in the answer.

Any other rule than the one adopted by the courts, would tend to defeat the very aim and object of all pleadings, and would be so productive of confusion, and of possible injustice, that it were better to dispense with all attempts at formal pleading, and depend only upon oral statements made at the moment of trial. What more striking illustration could there be of the surprise and danger, which might attend a rule of practice, such as is invoked by the plaintiff, than is afforded by the very case we have in hand. A defendant, sued in an action of debt upon a bond, answers that the bond has been merged in a judgment and is therefore extinguished. For a complete defence to the action as urged against Burgwyn, nothing more is needed, and anything more on her part would be considered as redundancy. To give judgment against her upon the strength of that statement alone, would manifestly be to deprive her of the opportunity of defending herself against the pleaded judgment as creating a subsisting liability. Very true, at the trial, she admitted that it had never been *paid*, but whether there are other valid defences against it, she has never had the opportunity to make known, and it is impossible for the court to anticipate.

Liberal as the *Code* is of amendments, and careful as it is to avoid the decision of causes upon points not involving their merits, it has provided no cure for omissions such as the plaintiff has been guilty of, and neither could it do so without subjecting the defendant to such danger from surprise as would be altogether unjustifiable.

The case is one in which the cause of action as proved is wholly variant with that alleged in the complaint, and falls

clearly under section 130 of C. C. P., which makes no provision for amendments in such cases. How far it is the purpose of the legislature to restrict the discretion of the judge in disallowing amendments, in cases of immaterial or partial variances between the proofs and the pleadings, as provided for in sections 128, 129 and 132 of the *Code*, we are not now prepared to say. But we are sure, that, in a case like the present, in which the plaintiff, in the expectation of benefit to himself, has purposely withdrawn certain of his alleged causes of action, it must rest within the discretion of the court to say, whether or not he shall be permitted to reinstate them in his complaint.

It cannot be that the pleadings in a cause can be kept thus shifting, first presenting one cause of action, and then another, at the will of the party, and free from all control on the part of the court.

If clothed with a discretion in the matter, His Honor has already exercised it by refusing the plaintiff's motion, and it is needless therefore, even conceding it to be a case in which the law would tolerate such an amendment, to remand the cause, as was done in *Shelton* v. *Davis, supra*, and *Pierce* v. *Mason*, 78 N. C., 37, to the end that the question may be considered; and nothing can be done, save to reverse the judgment of the court below and to give judgment here for the defendant, S. E. Burgwyn, that she "go without day," and that the attachment be dissolved.

The plaintiff will pay the costs of both appeals.

Error. Judgment according.

WILLIAM F. PERRY v. E. G. JACKSON.

Trial—Issues—Evidence—Fraud—Examination of Witness—Ejectment—Rental Value.

1. Submission to the jury of a needless issue, and proof of an admitted fact, which are not seen to be prejudicial to the party excepting, are not assignable for error.
2. The answer to an alleged improper question, not the question itself, constitutes ground of exception.
3. Where fraud in the execution of a deed is alleged, and the insolvency of the grantor inquired into, it was held competent on cross-examination to ask the witness if such insolvency was not well known in the grantor's neighborhood—as tending to discredit the witness.
4. The manner of conducting the examination of witnesses on a trial is left to the discretion of the presiding judge, whose duty it is to see that no prejudice arises from the tone in which questions are asked, as tending to impeach their credit.
5. Evidence of the annual rental value of land for a period preceding the time to which the plaintiff's title extended, is competent to show an average value common to each year.
6. Proof that the value placed upon two tracts of land, in dispute in this case, was disproportionate to their actual value, is admissible upon the question of fraud.

(*Worthy* v. *Caddell*, 76 N. C., 82; *Bost* v. *Bost*, 87 N. C., 477, cited and approved).

EJECTMENT tried at Fall Term, 1882, of WAKE Superior Court, before *McKoy, J.*

The defendant appealed.

Messrs. Fowle & Snow, for plaintiff.

Messrs Argo & Wilder and *Battle & Mordecai*, for defendant.

SMITH, C. J. The lands claimed and sought to be recovered in this action formerly belonged to one Willis H. Ray, who, and his wife, on September 15th, 1869, for the recited consideration of $120, conveyed one of the tracts containing 109 acres to his

son, Tyrrel Ray, and the latter on May 8th, 1872, for the consideration of $260 conveyed the same to the defendant.

The other tract containing 123 acres, the said Willis H. Ray, on the same day (September 15th, 1869), his wife uniting with him, conveyed for the alleged sum of $250 to his son-in-law, Horace R. Chappel, and Chappel and wife on January 5th, 1878, for the sum of $1,000, conveyed the same to the defendant.

The plaintiff derives his title to the land by virtue of sundry executions issued on judgments recovered by creditors of Willis H. Ray, in April, 1869, and in October, 1870, and, as he alleges, duly docketed in the superior court before the execution of the deeds in September, 1869; the sale under them by the sheriff, and his deed therefor to the plaintiff.

The answer of the defendant admits the fraudulent character of the deeds from Willis H. Ray, the debtor, but alleges that the deeds to himself were *bona fide* made upon and for good and full consideration, and without his having notice of the fraud infecting the prior conveyances.

The parties failing to agree upon the form of the issues, the court prepared and submitted to the jury the following:

1. Is the plaintiff the owner and entitled to the possession of the lands described in the complaint?

2. How much damage is plaintiff entitled to recover for the wrongful detention of the lands?

3. Did the defendant pay a full and fair price for the lands when he purchased them from Horace R. Chappel and Tyrrel Ray?

4. Did the defendant, at the time of his purchases of the several tracts, have notice of the fraud between Willis H. Ray and his vendees, Tyrrel Ray and Horace Chappel?

The defendant objected to the first two issues; the first, as unnecessary and involving only a question of law; the second, as not warranted by the allegations in the pleadings.

The court overruled the exception to the first issue as not well founded, and, to remove the ground of objection to the second,

permitted an amendment to the complaint claiming damages for the wrongful detaining, and thus introducing this element in the controversy.

We see no sufficient reason to sustain the objection to the first, which at most is needless. The finding of the 3d and 4th issues, favorably to the plaintiff, does not alone entitle the plaintiff to a recovery, but simply avoids the defendant's title as against the creditors of the fraudulent grantor, enforcing their debts by process of law, and persons purchasing under such process. It was not, therefore, inappropriate to add an issue as to the plaintiff's title and right of possession, to the solution of which the jury responses to the others may materially contribute. If, however, the submission of the issue were superfluous, we cannot see how the defendant can be prejudiced by the unnecessary proof of an admitted fact, so as to constitute a reviewable error to be corrected on the appeal.

Upon the trial before the jury, the defendant, examined on his own behalf, testified that he resided within four miles of Willis H. Ray, and at the times when the two deeds were executed to himself, he knew nothing of said Ray's insolvency, nor of his pecuniary condition, nor about his transactions with either his son or son-in-law, nor of the judgments against him, nor of any difficulty about the title, until just before the present suit was brought, and then for the first time heard of it. On his cross-examination, after the witness had stated that he lived within one hundred yards of part of the land in dispute in the year 1869, when the homestead was set apart to said Willis H. Ray under one of the executions, he was asked these questions:

1. Was not Willis Ray's insolvency well known in the neighborhood?

2. Was there a man or woman living in the neighborhood who did not know of his insolvency when the homestead was laid off?

Both interrogations were opposed by the defendant, admitted by the court, and exceptions entered thereto. The response of

the witness to the first was that he did not know; and to the second, that he could not answer the question.

The questions were entirely competent, as tending to discredit the previous testimony of the witness that he knew nothing of the insolvency of Ray—the known or reputed insolvency being a circumstance bearing upon the fraudulent character of the deed of the insolvent debtor, and tending to fix the defendant with notice or knowledge of the fact, or at least to put him on inquiries, which, if pursued, might result in his acquiring such knowledge, which is of equivalent force and effect.

But a sufficient answer to the objection is that the inquiry elicited no information, and it is not the question but the response to it, when improper and incompetent as evidence, upon which error can be assigned. *Bost* v. *Bost*, 87 N. C., 477.

The defendant's counsel complain of the language employed in the second interrogatory, and the supposed tone and manner in which it was addressed to the witness, as involving an impeachment of his integrity and truthfulness, and also leading. These are matters (and we cannot go out of the record to assume what is suggested, but does not appear in it) which rest in, and must be left to the discretion of the judge who conducts the trial, and which, unless grossly abused if even in such case, is not subject to the revision and correction of an appellate court, as an error in law.

Again, the defendant complains that a witness for the plaintiff was asked and upon objection allowed to testify to the rental value of the lands during the ten years preceding the trial, while the plaintiff's title extended back only four years, and to estimate during that interval the value of the use and occupation of the one tract at $40 and the other at $80. It was in the defendant's power to inquire as to the value during the period covered by the plaintiff's claim, if it were not uniform during the ten years, and thus prevent an injustice to himself. As he has not, it must be assumed that this average was common to each year, and if so, he is properly chargeable upon the evidence as if con-

fined to the four years immediately preceding, and the verdict awards damages only for this interval. The proof as to the other six years is only superfluous.

The witness was further interrogated as to the actual value of the different tracts, at the time when the respective deeds were made to Tyrrel Ray and Chappel, and to this the defendant objected, as, offered to prove the conceded fraud in the execution of those conveyances, needless and calculated unfavorably to influence the jury in rendering their verdict. This exception is not well founded. The defendant derives his title through the fraudulent deeds, and is presumed to know their contents and the sum stated as the purchase money of each. If these are greatly disproportionate to their actual value, the information would suggest the want of entire good faith in the transaction, and an intent to screen the property from creditors, and this would be greatly strengthened by the close relationship among the parties. The answer shows such disparity, the one tract being valued at $300 and the other at $500, and this was proper for the consideration of the jury.

We can understand how unnecessary evidence, such as that introduced, and its introduction held to be error in *Worthy* v. *Caddell*, 76 N. C., 82, may tend to mislead and prejudice the jury, but it is not easy to see how mere proof of an admitted fact can have this effect generally, or can constitute error in law. But the evidence here admitted is obnoxious to no such criticism, and was both pertinent and material upon the contested issue of notice of the fraud.

We have not considered the question whether the judgments were docketed, before the deeds of Willis H. Ray were executed, upon the proper book, so as to create a lien under the provisions of the Code, since the verdict of the jury dispenses with the inquiry.

The remaining exception is as to the judgment for damages upon the verdict.

The jury award the sum of $100 as a fair rental for each

year since the plaintiff acquired his title under the sheriff's deed, to-wit, from July 8th, 1878, with interest on each annual sum, deducting therefrom the sum of $675 paid by defendant for the land. This verdict would extinguish the damages if thus applied, but so much of it as directs the reduction must be regarded as surplusage and not in response to the issue, and moreover, the money paid in purchasing the land cannot legally be applied in payment of rent. But as the plaintiff remits all in excess of $91.66 due as of July 8th, 1882, he is entitled to recover that sum.

There is no error and the judgment must be affirmed, and it is so ordered.

No error. Affirmed.

NOAH LEGGETT v. ALFRED LEGGETT.

Jurisdiction of Supreme Court over Issues of Fact and Questions of Fact—Trial by Jury—Purchaser—Parol Trust.

1. Whether, under the provisions of the amended constitution in reference to the jurisdiction of the court over "issues of fact" and "questions of fact," a party has the *right* to have a cause, heretofore cognizable only in a court of equity, tried by the court without the intervention of a jury—*Quære.*
2. But where, in such case, a party has of his own accord accepted a trial by jury, he cannot afterwards have the same facts passed upon by the court.
3. Where the defendant, in pursuance of a previous understanding, bought land for the joint benefit of the plaintiff and himself—the plaintiff paying a large portion of the purchase money and contributing equally to the employment of a common counsel in the management of the matter—both parties being mutually interested—and the defendant procured the deed to be made to himself alone; *Held*, that the plaintiff is entitled to an execution of the parol trust, and to that end, to have the defendant declared a trustee for his benefit.

4. This case is distinguishable from *Turner* v. *Eford*, 5 Jones' Eq., 106, since here, the plaintiff is not attempting to have a fraudulent contract enforced, but an agreement subsequent and wholly disconnected.

(*Shields* v. *Whitaker*, 82 N. C., 516; *Turner* v. *Eford*, 5 Jones' Eq., 106, cited and approved.)

CIVIL ACTION tried at Fall Term, 1882, of BEAUFORT Superior Court, before *Gilliam, J.*

In 1871, Henry Leggett died in Beaufort county seized of several parcels of land, which for want of lineal heirs descended to his brothers and sisters, eight in number, and including both the plaintiff and the defendant. Subsequently to his death, though at different dates, the plaintiff and defendant executed deeds, whereby they purported to convey their respective interests in the estate of their brother to one Harper H. Coor.

In 1872, certain of the heirs filed their petition in the superior court, seeking to have the lands sold for partition. To this petition, neither the plaintiff nor defendant were parties, but the said Coor, as having purchased their shares, was made a party defendant. The proceeding pended until spring term, 1874, when an order of sale was made, and the clerk of the court was appointed a commissioner to make the sale, which he did in July of that year upon a credit of twelve months, reserving the title until the purchase money was paid. The sale was afterwards confirmed by the court, with directions to make title to the purchasers upon the payment of the purchase money.

During the pendency of the proceedings, the said Coor made a deed to the defendant, purporting to convey to him all the interest which he (Coor) had acquired in the estate of the said Henry, but still, the defendant was not made a party to the proceeding.

Amongst the lands so sold was a tract known as the "Biggs tract," and containing 210 acres, which was bid off by the defendant at the price of $635; of this sum $127 was paid in cash on the day of sale, and the defendant gave a bond for the residue with the plaintiff and the said Coor as sureties. This balance

was afterwards paid to the commissioner, from whom the defendant procured a deed in his own name.

In his complaint, the plaintiff alleges that it was expressly agreed between the defendant and himself that the land should be bought for the benefit of them both, to be held according to the amount they might each contribute to the purchase money; that accordingly they both attended the sale, and the land was really purchased by the defendant for their mutual benefit, and with this understanding, the plaintiff furnished the money to make the cash payment of $127; that notwithstanding his deed to Coor, the plaintiff had a full share in the lands of his brother which were sold, amounting to the sum of $178.32, which was afterwards applied as a credit on the note given for the purchase money, and that he also made another cash payment of $151.36, and that all that was ever contributed by the defendant was his share in the lands, amounting to $178.32; that notwithstanding their agreement, and the fact that the plaintiff had contributed so largely towards the payment of the purchase money, the defendant had fraudulently procured the deed to the whole land to be made to himself, and refuses to recognize him as having any interest therein; and the prayer of the complaint is that the defendant be declared a trustee for the plaintiff, and be required to convey to him two-thirds of the land so purchased.

In his answer, the defendant denies that there was any such agreement as that alleged by the plaintiff, and avers that he bought the land for his own sole use and benefit, and that he has paid for the same out of his own money, and without any help on the part of the plaintiff, or any understanding that he should help. He admits that about that time he received several sums of money from the plaintiff, but these were paid him for horses and other property sold to the plaintiff, and for which there is still a balance due him from the plaintiff.

On the trial, the plaintiff was examined as a witness, and testified substantially the same with the allegations set forth in his complaint, except that he added that the deed which he had made

to Coor for his interest in his brother's estate, was without consideration, and was intended to be for his own use and benefit, which fact was well understood and agreed to by both Coor and the defendant. He also stated that on the very day of the sale the defendant admitted to the clerk, who as commissioner was making the sale, that he was purchasing for the joint benefit of himself and the plaintiff, and that the latter was entitled to a full share of one-eighth in the lands belonging to the estate of their deceased brother, and that the same was to go as a credit upon the purchase money of the "Biggs tract." He also testified that certain notes which he had given to the defendant, and upon which judgments had been taken, were obtained from him while drinking, and that he had received nothing of value for them, and had never bought any horses or mules from the defendant; and also, that he had not authorized the defendant to have the deed made to himself, or to tell Mr. Brown, their counsel, to allow it to be so made.

Further evidence was offered on the part of the plaintiff as follows:

G. H. Brown, Jr., testified that he was employed by the plaintiff and defendant as their attorney, in the proceedings for partition, and did not know Coor in the matter at all; that he was present at the sale when the defendant bid off the land, and plaintiff was also present, and his share and that of the defendant in the whole of the lands sold, were credited on the purchase money for the Biggs land; that some time after the sale, the defendant came to the office of witness, and said that the plaintiff had instructed him to tell the witness to have the deed for the land made to himself alone; that witness thereupon inquired why that should be, as it was understood that he had bid off the land for both the plaintiff and himself, to which the defendant replied that he had made it all right with the plaintiff; that acting upon this assurance, he had instructed the clerk to make the deed to the defendant, and that for his services in the matter he was paid equally by both of the parties.

John Dudley testified that at the time of the sale and when the land was bid off, he was told by both plaintiff and defendant that the latter had bid it in for their mutual benefit; that sometime after the sale, while the defendant was living with the witness, he went to town, and when he returned, said that he had a deed for the whole land; witness asked him if the plaintiff had not paid for it, when he replied, "Yes," that he had paid his share in the lands, and every cent that was paid, except defendant's own share in the lands, but that the plaintiff was owing a good deal outside.

The clerk (the commissioner who made the sale) testified that the defendant had come to him with the deed prepared, and he had signed it because he knew that Mr. Brown was the attorney of both parties, and he therefore supposed it to be all right.

The defendant introduced H. H. Coor as a witness, who testified that the deed from the plaintiff to himself for the interest of the former in the lands of his brother, was for a valuable consideration, though at the time of the sale he heard the defendant tell the clerk that the plaintiff's share was to go as a payment on the purchase money, and that he would make it all right with him.

The defendant also offered in evidence nine judgments, each for the sum of $192, which he had obtained against the plaintiff on the 16th day of January, 1877, upon notes that bore date in May, 1867.

There was also some evidence of plaintiff's having purchased a horse of the defendant in 1868, and of his saying that he was indebted to the defendant for the same.

The counsel prepared the issues, and with the consent of both parties the following were submitted:

1. Did the defendant purchase the land at the sale, for the joint benefit of himself and the plaintiff, and was this done by reason of a previous agreement? to which the jury respond "yes."

2. Did plaintiff pay any portion of the purchase money, in

money, and if so, how much? Answered—"Two hundred and seventy-one dollars."

3. Was the one-eighth share of sales of land agreed by defendant, on the day of sale, to belong to the plaintiff, and was that used in paying for the land? Answered—"Yes."

The case states that no exceptions were taken to the evidence, and none to the charge as given, and that when called upon at the close of the charge, to know if they desired any special instructions given, none were asked for on either side.

After the verdict, the defendant's counsel insisted that inasmuch as the evidence was altogether by parol, and was unsupported by any facts or circumstances, it was insufficient to authorize the court to declare a trust and the defendant a trustee, and therefore moved for judgment for the defendant, notwithstanding the verdict; motion overruled; judgment for the plaintiff, and appeal by defendant.

M. Geo. H. Brown, Jr., for plaintiff.

No counsel for defendant.

RUFFIN, J., after stating the case. To maintain his position, it is necessary that the defendant should establish two propositions: First, that by reason of the recent amendment of the constitution (Art. IV., § 8) this court can, and indeed must, in all cases that were hitherto cognizable only in a court of equity, pass upon the verdict of the jury, and, if in their opinion it should be founded upon insufficient testimony, wholly disregard it; and secondly, that in this particular case, the evidence received and acted upon was not sufficient to warrant the court below, in declaring a trust in favor of the plaintiff as to the land in question. A failure as to either point, it is apparent, must be fatal to his case.

If for want of power in the court to disturb it, the verdict stands and is to be respected, that must necessarily conclude the question; and so too would a conclusion, on the part of the

court, that the evidence justified the verdict and warranted the judgment.

The first proposition seems to be conclusively met by the decision made in *Shields* v. *Whitaker*, 82 N. C., 516, where it was held, that even since the amendment, this court could not look into the evidence, in any case, for the purpose of correcting the verdict of a jury, but that the same was as binding on the courts as it ever was. But if this was not ordinarily true, we should without hesitation hold it to be so in a case in which, like the present, the party had voluntarily submitted to having his cause tried by a jury, upon evidence to which no objection was made, and under instructions to which no exception was taken. It is too late, after a party has thus taken his chances, to object to the tribunal that has tried the cause as incompetent, because incapable of correctly apprehending and appreciating nice equitable distinctions between the different sorts of proof.

The exact effect of the amendment upon the jurisdiction of this court, has never been definitely settled as yet, nor has the question—which seems necessarily to be involved in the other—as to how far it confers upon parties *the right* to have their causes, when purely of an equitable nature, tried by the judge in the court below, without the intervention of a jury.

These are important questions, and their solution made difficult because of the fact, that as now constituted, the same court exercises jurisdiction in both law and equity, and administers both under one common form of procedure—thereby necessarily blending the two, and making it almost impossible for the courts, in the absence of all legislative directions, to define the limits of each.

But, however these questions may be ultimately decided, it will never, we surmise, be held to be law, that a party who has of his own accord accepted a trial by a jury, can insist upon having the same facts passed upon by the court.

As to the second point, we do not understand it to be questioned, but that with us a trust may be declared, and may be

proved by parol. But it is insisted that to do so, the courts require, as in those cases where an absolute deed is sought to be converted into a security, something more than the mere declarations of parties—something confirmatory, and consisting of acts and circumstances *dehors the deed.* Conceding this to be the rule, the court still thinks that the case discloses testimony amply sufficient to support the plaintiff's case, and that of the very sort said to be requisite. Outside of the simple declarations of the parties, there is the *fact* that they both retained Mr. Brown as their common counsel, contributed alike to his compensation, and gave him to understand that, notwithstanding their conveyances to Coor, they still had interests in the lands to be sold, and were to be mutually interested in that to be purchased; and also, the *fact* that these very shares were afterwards, and in pursuance of this very understanding, applied as credits upon the purchase-money of the "Biggs tract." These, taken in connection with the fact that their joint interest was so well known to their counsel and the clerk, as to make it necessary for the defendant to resort to falsehood in order to procure the deed to be made to himself alone, are utterly inconsistent with any other state of facts than that deposed to by the plaintiff, and which the jury have pronounced to be true.

No point was made, either in the court below, or in this court, as to the propriety of a court of equity giving help to the plaintiff, after he had made a fraudulent conveyance of his interest in the land to Coor; but if there had been, we do not think it could have availed, since it is not the fraudulent contract which is attempted to be enforced in this case, but a subsequent agreement wholly disconnected with the other, and herein this case is distinguished from *Turner* v. *Eford*, 5 Jones' Eq., 106.

There is no error, and the judgment of the court below must be affirmed.

No error. Affirmed.

*R. Y. VAUGHAN and others v. J. S. VINCENT and others.

Practice—Additional Security for Costs—Special Proceedings—Judgment—Receiver.

1. The court has power in a proper case to order the defendant to give additional security for costs, and, on failure to comply with such order, to strike out the answer and award judgment.
2. Where a special proceeding is transferred to the superior court for the trial of issues raised by the pleadings, and the answer is stricken out, the jurisdiction of the superior court ceases—there being then no issue to try. In such case a *procedendo* should issue to the probate court.
3. The appointment of a receiver was not warranted under the facts of this case.

(*Rollins* v. *Henry*, 77 N. C., 467, cited and approved).

*Mr. Justice RUFFIN having been of counsel, did not sit on the hearing of this case.

SPECIAL PROCEEDING commenced before the clerk, and heard at Fall Term, 1882, of CASWELL Superior Court, before *Shipp, J.*

The plaintiffs filed their petition to sell land for partition, alleging that they and the defendants are tenants in common, but owing to the large number of persons interested, it is impossible to have actual partition without serious injury to all of them.

The defendants denied the tenancy in common, and pleaded "sole seizin," and that they had been in the actual possession of the land for more than seven years with color of title.

Issues of fact being thus raised, the case was transferred to the superior court for trial, and at fall term, 1881, the defendants filed an undertaking in the usual form to secure to the plaintiffs such costs and damages as they might recover. The plaintiffs subsequently (at June special term, 1882) made affidavit that the said undertaking was insufficient to cover the costs and damages which had already accrued and would accrue before trial could be had, and thereupon the court ordered the defen-

dants to file an additional bond in the sum of two hundred dollars, on or before the first day of the next term, and before they are permitted to make further defence to the action.

At fall term, 1882, it being made known to the court that defendants had failed to file said bond, as required, the following judgment was rendered: "The defendants not having filed the bond required by the order made at June term, 1882, nor showing sufficient cause therefor, it is now adjudged that their answer be stricken from the file, and the lands described in the complaint be sold by W. C. Harralson, as commissioner, after due advertisement upon the terms—one-third cash, and the balance at twelve months, with interest from day of sale—the proceeds to be applied to costs and expenses, and the surplus divided among the parties, plaintiff and defendant, according to their respective rights as set forth in the complaint. The said Harralson is appointed a receiver by this court, and will take such proper rents from the corn, tobacco, or other crop found upon the premises, as may be usual, and sell the same and hold the proceeds subject to the further order of the court. The question of damages is reserved for trial by the jury, or in such manner as may be agreed upon, and to be paid out of the defendants' interest in the crop or the bond filed by the defendants; and any deficiency, out of the proceeds representing the plaintiffs' interest in the land. The commissioner and receiver will make report of his proceedings, and, after payment of purchase money in full, will execute title to the purchaser."

From this judgment the defendants appealed, assigning as error, the striking out the answer, and the directions given the receiver and commissioner as to the disposition of the funds; that the failure to file the bond as directed by the order of June term, 1882, only entitled the plaintiffs to have a receiver take charge of the rents, the bond filed before answer filed entitling the defendants to have their answer remain and a trial upon the merits according to the issue raised.

Messrs. J. W. Graham and *J. C. L. Kerr*, for plaintiffs.
No counsel for defendants.

ASHE, J. The only exceptions taken to the judgment of the superior court, were, to the striking out the answer of the defendants, and to the directions given the receiver and commissioner as to the disposition of the fund.

The proceeding was commenced before the clerk upon the defendants' giving a bond for costs and damages, and filing their answer, in which the defence of "sole seizin" was set up, and the case was put on the trial docket of the superior court, that the issue raised by the pleadings might be tried by a jury.

The power of the court to require the bond of the defendants in such a case being conceded, it follows that the court upon a proper affidavit, such as was filed in the case, had the power to order an increased security for the costs. *Rollins* v. *Henry*, 77 N. C., 467. And if it had the power to order the enlargement of the security, in the event of a failure to comply with the order, the court must have had the same power to strike out the answer as it would have had if no bond had been orignally filed.

The proceeding, when "sole seizin" is pleaded, like ejectment, is an action for the recovery of real property; and section 382, ch. 17, Battle's Revisal, requires, that "in all suits in the superior court for the recovery of real property or the possession thereof, the defendant, before he is permitted to plead, answer, or demur, shall execute a bond to secure such costs and damages as the plaintiff may recover," &c. If no bond shall be given, the defendants have no right to answer; and if they should answer without filing the bond required, the court would have the power to strike out the answer and render judgment, as for want of an answer; and the court having the power to order an additional bond, in a proper case, would, upon the same principle, have the power to strike out the answer filed—the same as if no bond had been given.

But when the answer is stricken out, there is no issue to be

tried: the case loses the character of a suit for the recovery of real property, and stands, as originally, in the clerk's court, a "special proceeding" for the sale of land for partition between tenants in common. And as it is the issue to be tried which gives the superior court, in term, jurisdiction of the case, as soon as the issue is withdrawn, that court is divested of its jurisdiction, and any order or judgment it might make, except in a proper case to appoint a receiver, would be *coram non judice*.

But we do not consider this a proper case for the appointment of a receiver. When the answer was stricken out, there was no other pleading in the case but the petition: there was nothing before the court to show that the defendants were in the exclusive possession of the rents and profits, excluding their co-tenants, the plaintiffs, from all participation therein, or that the defendants were insolvent or mismanaging the common property. The courts are averse to the appointment of receivers in actions between tenants in common, except for some such causes as those above mentioned. High on Receivers, 603.

We are of the opinion there was error in the appointment of a receiver, and ordering the sale. In other respects the judgment is affirmed. The case is remanded to the superior court that a *procedendo* may be issued to the clerk of said court to proceed to order a sale of the land described in the petition according to the course of practice in said court.

Error. Judgment accordingly.

COMMISSIONERS OF WAKE v. CITY OF RALEIGH.

Reference—Account—Fines—Towns and Cities—School Fund.

1. A reference for an account should not be ordered before passing upon a defence set up, which if sustained may put an end to the controversy.
2. Fines imposed and collected under city ordinances, are not included in the constitutional provision appropriating fines, &c., collected in the several counties to the school fund.

(*R. R. Co.* v. *Morrison*, 82 N. C., 141; *Neal* v. *Becknell*, 85 N. C., 299; *McPeters* v. *Ray*, *Ib.*, 462, cited and approved).

APPEAL from an order of reference made at June Term, 1882, of WAKE Superior Court, by *MacRae, J.*

Defendant appealed.

Messrs. Fowle & Snow and *T. R. Purnell*, for plaintiff.

Messrs. Reade, Busbee & Busbee, for defendant.

SMITH, C. J. The object of the present action is the recovery of moneys alleged to belong to the plaintiffs, as a board of education for the county, collected and paid into the treasury of the city of Raleigh.

The complaint charges the fund claimed to have been derived from "the net proceeds of the sale of estrays and the clear proceeds of the penalties and forfeitures and fines for breaches of the penal laws of the state of North Carolina"—following the language of section four, article nine, of the amended constitution, which appropriates moneys received from these sources to the establishment and maintenance of free public schools.

The demurrer put in by the defendant assigns, among other causes, that the fund demanded was collected by the "defendant under and by virtue of its charter and the laws of the state," and by its own proper officers, and that the defendant is entitled thereto.

The demurrer being overruled, the defendant answered, denying that any moneys described and appropriated in the clause of the constitution referred to, and to which the plaintiffs have a rightful claim, have been received by the defendant.

Upon the complaint and answer, but without an adjudication upon the issue of law made in the pleadings, and involving the preliminary question of the defendant's liability in the premises, at the instance of the plaintiff an order of reference was entered, directing a statement of "an account of the fines, penalties, forfeitures and estrays collected by the defendant from the sources mentioned in the complaint, and report to this court."

The defendant appeals from this judgment, and our only inquiry is as to its regularity and correctness at this stage of the proceeding, and before the determination of the preliminary matter which may be decisive of the cause, and render any reference unnecessary.

There is an obvious irregularity in ordering a reference for an account, before disposing of a defence founded in law or in fact, and which if sustained puts an end to the action and renders an inquiry useless. The rule of practice in an orderly course of procedure is to have such defence first passed on and decided, as is explained in *A. T. and O. Railroad* v. *Morrison*, 82 N. C., 141, and again recognized in *Neal* v. *Becknell*, 85 N. C., 299.

The force of the decision is not impaired by the ruling in *McPeters* v. *Ray*, 85 N. C., 462, which is based upon the particular circumstances of the cause, and while the reference preceded the determination of the issue as to a partnership, it was made in express terms without prejudice as to the defence, and the existence of the partnership, conceded in the answer to a limited extent, was afterwards found by the jury. The irregularity, if such it be, was thus corrected and all the just rights of the defendant preserved.

The overruling of the demurrer is not a determination of the question of the defendant's liability for, and the plaintiff's right to the moneys derived from fines, forfeitures and penalties under

city ordinances, but for such only as are described in the complaint and claimed under the constitution, and therefore the case made in the answer and resting upon different facts is not involved in that decision.

But as the order of reference is susceptible of an interpretation that it is based upon the assumed truth of the statements in the answer, and an adjudication of the defendant's liability thereon, it is not inappropriate to refer to and ascertain the extent of this constitutional appropriation.

In the Revised Statutes, ch. 28, §4, "fines, forfeitures and amercements" are required to be paid over to "county trustees, for the purpose of defraying the costs of state prosecutions and the contingent expenses of the county." The same provisions in substance are contained in the Revised Code, ch. 28, §§ 3 and 5, and brought forward in Battle's Revisal, ch. 29, §§ 2 and 4.

The constitution of 1868 (Art. IX, § 4) appropriates, for the establishing and perfecting of free public schools, "the net proceeds *that may accrue to the state* from sales of estrays, or from fines, penalties and forfeitures." There is some change in the terms in which the appropriation is made in the constitutional amendment of 1875, which devotes to the same purpose "the net proceeds from the sale of estrays, also the clear proceeds of all penalties and forfeitures, and of all fines *collected in the several counties* for any breach of the penal or military laws of the state." Art. IX, § 5.

It is plain from this review of past legislation in regard to the distribution of the fund arising from these sources, as well as from the sale of estrays, that the appropriation in the constitution does not extend to fines, penalties or forfeitures, nor the proceeds of estrays sold, incurred, or arising in the enforcement of ordinances and rules adopted by a municipal corporation for local government. They do not "*accrue to the state*," nor are they collected in the counties for a violation of penal or military law, or by county officers upon whom this duty is devolved. It is only such that are given to the county board of education.

Those imposed to compel obedience to the laws enacted in the government and well ordering of the city, are recoverable by an action in the name of the mayor, and of course to the use of the city by an express provision of the charter (§ 83), and may be enforced when reduced to judgment, if necessary, by compulsory labor on the public streets. Acts 1866–'67, ch. 13, § 1. These cannot, upon any reasonable interpretation, be deemed to be within the intent of the framers of the organic law, as they are not within the terms in which the intent is expressed.

The act of 1871–'72, which makes the breach of a city or town ordinance a misdemeanor, simply subjects the offender to an indictment, and perhaps the fine imposed on conviction would belong to the board of education, but it cannot affect the title to fines as are imposed and collected by municipal officers and agents for municipal purposes.

We have given our views upon the subject matter of litigation, as it may facilitate the final disposition of the cause, and because it seems to be incidentally involved in the making the reference, but we simply decide there is error in making it before disposing of the preliminary defence to the action.

The judgment is reversed and this will be certified.

Error. Reversed.

JOHN L. SAULTER v. NEW YORK & WILMINGTON STEAMSHIP COMPANY.

Master and Servant—Shipping—Pilotage—When owner of Vessel and pilot in charge liable for accident.

1. The relation of master and servant exists between the owner of a vessel and a licensed pilot, temporarily taking the master's place in controlling the navigation of the vessel.
2. Where a steamer collided with the plaintiff's boat lying at a wharf, there being room for the steamer to leave its mooring without the danger of

collision; *Held*, that the owner of the steamer is liable to the plaintiff in damages for the injury sustained.

3. The pilot is individually liable only where he is in actual charge and solely at fault; and this must be affirmatively shown, together with the fact that there was no fault on the part of the officers and crew of the colliding vessel, to relieve its owner of the *prima facie* liability for the accident; and any concurring negligence with the fault of the pilot will not exempt the owner.

(*Gunter* v. *Wicker*, 85 N. C., 310, cited and approved).

CIVIL ACTION, tried at June Term, 1882, of NEW HANOVER Superior Court, before *Gilmer, J.*

The defendant appealed.

Messrs. M. & J. D. Bellamy, for plaintiff.

Messrs. Thos. W. Strange and *Haywood & Haywood*, for defendant.

SMITH, C. J. The plaintiff's flat was along side of and fastened to another flat lying at a wharf, distant from the defendant's steamer, variously estimated from twenty to sixty-six feet, where it had arrived at about 3 o'clock in the morning, and had a right to be. The steamer in charge of a pilot was also at her proper place, and was then preparing to start on her regular outward voyage to New York.

The movements on board the steamer were noticed by the plaintiff and his associates on the flat, and the danger of collision became the subject of discussion among them. An hour later the steamer began to back, in order to get out into the river, when within some ten or twelve feet of the flat, a man on the steamer, and supposed to be her captain, was hailed by one of the men on the flat, and was asked not to strike the flat. No answer was returned, and he seems not to have been heard by any one on board, and soon the steamer struck the flat and did the damage claimed in the action.

The plaintiff had time, after the steamer began to move, to place his flat beyond the danger of collision, and made no effort

to do so. The steamer pursued her usual course in detaching herself from the wharf, but she had sufficient room in the space between the two boats to turn round and get off, without colliding with the flat. Upon these facts given in evidence, two instructions were asked for the defendant.

1. The steamship then being under control of a licensed pilot, the defendant company, not having the management of their ship, was not responsible for the negligent conduct of her movements, but the pilot, personally, if any one.

2. The plaintiff (and others with him) having reason to apprehend the peril, and opportunity to remove the flat beyond its reach, after noticing what was going on, on board the steamer, and not doing so, was guilty of contributory negligence, and he could not recover.

The instructions were both refused, and instead the jury were charged that to acquit the defendant of liability upon the first ground, they must find that the injury was caused by the personal negligence of the pilot in managing the ship; and as to the second point, that the plaintiff's flat being lawfully at her place, he was not required to move her out of the way.

The instructions, as to the effect upon the defendant's liability of the steamer being then in charge of the pilot, was quite as favorable as the company could ask, and is in conformity with the adjudications in England in many of the shipping acts, of which there is contained an express provision exempting the owner or master from responsibility for damage or loss, occasioned by the neglect or want of skill in the pilot in charge. The result of these adjudications upon a full examination is declared by SWAYNE, J., speaking for the court, in *The China*, 7 Wall., 64, in these words:

1. "The exemption applied only when the pilot is actually in charge of the vessel, and solely in fault.

2. "If there is anything which concurred with the fault of the pilot in producing the accident, the exemption does not apply, and the vessel, master and owners are liable.

3. "The colliding vessel is in all cases, *prima facie* liable, and the party claiming the exemption must affirmatively show that the pilot was in fault," *and that* "*there was no fault on the part of the officers or crew, which might have been in any degree conducive to the damage.*"

If the principle of non-responsibility for injury caused by a colliding vessel, under the management of a pilot, on the part of the vessel itself or of the owners, and, as Mr. Justice SWAYNE, in the case referred to, says, "the ship is not liable if the owner is not," and that the liability of each are "convertible terms," prevails in all its rigor here, as interpreted and applied in England, it is subject to the modification contained in the instruction, that the pilot must himself be *individually* in fault, and none others of the ship's officers and crew are, and this must be shown by one claiming the exemption.

The statute law regulating pilotage on the Cape Fear river and the adjacent waters outside, requires pilots to be on the look-out for an incoming vessel, and when such is met beyond the bar, and the pilot's tendered assistance in bringing her into port is refused, he is entitled to the same fees as if the services had been received and rendered. Bat. Rev., ch. 87, § 24. But this does not compel the master to take the pilot on board, for he may continue to navigate and manage his ship, trusting to his own skill and knowledge of the waters, but the compensation is awarded the pilot because he has performed a large share of his work in searching for and reaching the ship, and it would be a manifest wrong to allow him nothing for it. Indeed, the system could not be maintained, unless the hardy and adventurous seamen who live upon the waves and brave the storms of the ocean, and whose services are so vitally important to commerce, were requited for these labors and perils. Accordingly, such a provision, or else coercion in taking a pilot, is contained in the laws of the different states that lie on the seaboard.

But even when the statute imposes a penalty to enforce the employment of a pilot, rather than awarded remuneration for

services tendered and declined, the rule of responsibility attaching to the colliding vessel and her owner (for their liabilities are the same) is not changed, and there is no sufficient reason why it should be. Pilots are provided for the benefit of the owner of the ship, and the substitution of the pilot in place of the captain is for her greater safety in reaching port.

"The services of the pilot," in the forcible language of the court in the case referred to, "are as much for the benefit of the vessel and cargo, as those of the captain and crew. This compensation comes from the same source as theirs. Like them he serves the owner and is paid by the owner. If there be any default on his part, the owner has the same remedies against him as against other delinquents on board. The difference between his relations and those of the master is one of form rather than of substance."

In legal effect then the relation of master and servant exists between the owner and the pilot, temporarily taking the master's place in controlling the navigation of the vessel, and the principle *respondet superior* equally applies.

The same doctrine is affirmed in the recent case of *Sherlock* v. *Alling*, 93 U. S., 99, by Mr. Justice FIELD, who in the course of an elaborate discussion quotes with approval the language of Mr. Justice GREER in *The Creole and Sampson*, 2 Wall, Jr., 515, thus: "When a pilot is required to be taken from those licensed, the relation of master and servant is not changed. The pilot continues the servant of the owners, acting in their employ, and receiving wages for services rendered to them, and the fact that he is selected for them by persons more capable of judging of his qualifications, *cannot alter the relations.*

2. The objection that there was concurring negligence, on the plaintiff's part, finds no support in the facts. The flat was at a place where the plaintiff had a right to have it, and there was room for the steamer to turn round and leave her mooring without injuring the flat. It was in the night, and it does not appear

that any light shone upon the surrounding water to disclose the near proximity of the injured boat, which it would seem the steamer ought to have to avoid collisions at such an hour; and the only fault imputed to the plaintiff is, that, seeing the danger, he did not get out of the way to escape it. This, his own sense of danger should perhaps have prompted him to do, and perhaps his hope that the steamer would not touch his boat alone prevented his doing. But this cannot excuse the negligence of the managers of the steamer, who directly caused the damages. Their action was the direct and immediate cause, and to them essentially the blame attaches.

We have had occasion to consider the effect of concurrent negligence, as effecting the right of recovery, in *Gunter* v. *Wicker*, 85 N. C., 310, and are content to refer to it.

But here, there was no negligence of the plaintiff in mooring his flat by the side of another, where it could lawfully remain, and the defendant company seeks to excuse its own wrong because the plaintiff did not get out of the way, and avoid it. This cannot exempt the company from the consequence of the negligent conduct of its own agents. The judgment must be affirmed.

No error. Affirmed.

THOMAS J. CAMPBELL v. GEORGE BOYD.

Roads and Bridges—Private Way, damages for neglect in repairing.

1. A private-way was opened by the defendant for his own convenience and a bridge built over a creek which ran across it, and the public used the same with his knowledge and permission; the plaintiff sustained injury caused by the breaking in of the bridge, which the defendant knew to be unsafe, but which was apparently in good condition; *Held*, he was liable to the plaintiff in damages.
2. The duty of reparation and the liability for neglect in such cases, rest upon the defendant, by whose implied invitation the public used the way.

(*Mulholland* v. *Brownrigg*, 2 Hawks, 349, cited and approved).

CIVIL ACTION tried at Fall Term, 1882, of BEAUFORT Superior Court, before *Gilliam, J.*

The defendant appealed.

Mr. George H. Brown, Jr., for plaintiff.

No counsel for defendant.

SMITH, C. J. The defendant owns and operates a mill, that has been built and used for one hundred years, at the head of Pungo creek. A few yards below its site the creek divides, and its waters flow in two separate streams. Along its course on either side run parallel public roads each two miles distant, and from them have been constructed private-ways leading up to and meeting at the mill, and affording convenient access from the roads to it. One of these ways was opened by former proprietors, and the other in the year 1867, by the defendant.

In 1875 or 1876, the defendant, with other owners of the intervening land, united in opening a connecting way, between those leading from the public roads, from near points in each, so as to form a direct pass-way across the two divergent streams from one road to the other, without going up to the mill. Over

these waters they also constructed bridges. While this direct route was opened mainly for the convenience of the defendant and his associates, whose lands were traversed, it was also used as well by the public with full knowledge of the defendant, and without objection from any one in passing between the roads.

In February, 1882, the plaintiff, with his horse, while in the use of this connecting way and passing one of the bridges, broke through, and both were precipitated into the creek and the damage sustained, for the redress of which the suit is brought.

The flooring of the bridge was sound, and there was no visible indication of weakness or decay to put a person passing over it on his guard. But the timbers underneath, and hidden by the floor, were in a rotten and unsound condition, and of this the defendant had full knowledge before the disaster.

He was at his mill and saw what occurred, and going up to the place remarked to the plaintiff that when he saw him about to enter the bridge, he thought of calling him to stop, but did not do so; that the bridge was unsafe, and he regretted he did not stop the plaintiff from crossing.

These are the material facts found by the judge, under the consent of parties that he should pass upon the evidence and ascertain the facts of the case, and our only inquiry is upon the correctness of his ruling that the defendant is liable in damages to the plaintiff, and from which the defendant appeals.

The only case in our reports bearing upon the point is that of *Mulholland* v. *Brownrigg*, 2 Hawks, 349. There, the defendant's mill-pond overflowed parts of the public road and hollow bridges had been erected, but by whom, did not appear; nor was it shown that they were built at the expense of the public. This condition of things had existed for twenty years, and the mill had been owned and operated by the defendant for the space of five years. The successive mill proprietors had kept the overflowed bed of the road and the bridges in repair. The plaintiff's wagon, loaded with goods, passing a bridge broke through, in consequence of its decayed state, and the goods were injured by

the water. The action was for this injury. It was declared by the court that as a nuisance was created by the flooding of the road, and the defendant had undertaken to remedy it in constructing the bridges, it was his duty, as that of preceding proprietors of the mill, to maintain them in a proper condition of repair, and ensure the safety of those persons, who in using the road had to pass over them, and that the damage having resulted from his negligence he was liable to the plaintiff. The proposition is asserted, that inasmuch as the defendant has undertaken to remedy a nuisance of his own creating, by constructing the bridge, he undertakes also and is bound to keep it in sufficient repair, and is answerable for the consequences of his neglect to do so.

The principle of law, in more general terms and with a wider scope, is thus expressed by HOAR, J., in *Combs* v. *New Bed. Con. Co.*, 102, Mass., 584. "There is another class of cases in which it has been held, that, *if a person allows a dangerous place to exist in premises occupied by him, he will be responsible for injury caused thereby, to any other person entering upon the premises* by his invitation and procurement, express or implied, and not notified of the danger, if the person injured is in the use of due care."

"The principle is well settled," remarks APPLETON, C. J., "that a person injured, without neglect on his part, by a defect or obstruction in a way or passage over which he has been induced to pass for a lawful purpose, by an invitation express or implied, can recover damages for the injury sustained, against the individual so inviting, and being in default for the neglect. *Tobin* v. *P. S. and P. R. R.*, 59 Maine, 188.

Several illustrations of the principle in its different applications will be found in Wharton on Negligence, § 826, and following.

The facts of the present case bring it within the rule thus enunciated. The way was opened by the defendant and his associates, primarily though, it was for his and their accommodation;

yet, permissively, to the general traveling public. It has, in fact, been thus used, and known to the defendant to be thus used, with the acquiescence of himself and the others; and under these circumstances it may fairly be assumed to be an invitation to all, who have occasion thus to use it, and hence a voluntary obligation is incurred to keep the bridges in a safe condition, so that no detriment may come to travelers.

Reparation is an inseparable incident of its construction, and, as the obligation to repair rests on no other, the liability for neglect must rest on those who put the bridges there and invited the public to use them.

It is true the way might have been closed, or the public prohibited by proper notices from passing over it, and no one could complain of the exercise of the right to do so, but as long as the way is left open and the bridges remain for the public to use, it is incumbent on those who constructed and maintain them to see that they are safe for all.

The law does not tolerate the presence over and along a way, in common use, of structures apparently sound, but in fact ruinous, like man-traps, inviting travelers to needless disaster and injury. The duty of reparation should rest on some one, and it can rest on none others but those who built and use the bridges, and impliedly at least invite the public to use them also. For neglect of this duty they must abide the consequences.

We hold, therefore, that there is no error, and the judgment must be affirmed.

No error. Affirmed.

*E. P. COVINGTON v. ANN. C. LEAK, Executrix.

Contract—Partnership.

A contract entered into whereby C agrees to devote his individual attention to the business of L's store, at a certain stipulated price per annum, is not a partnership transaction, but one between separate and distinct persons. It was the duty of the court in such case to interpret the instrument and not submit the question to the jury.

(*Adams* v. *Utley*, 87 N. C., 356, cited and approved).

CIVIL ACTION for the settlement of a partnership, tried at Spring Term, 1882, of RICHMOND Superior Court, before *Shipp, J.*

Plaintiff appealed.

Messrs. John D. Shaw, Frank McNeill and *Hinsdale & Devereux*, for plaintiff.

Messrs. Burwell, Walker & Tillett, for defendant.

SMITH, C. J. The complaint states that a mercantile copartnership was formed in September, 1865, between John W. Leak and the plaintiff, and carried on for a year or more in the individual name of the plaintiff, and then a new partnership arrangement entered into to be conducted in the name of the said John W. Leak, which was prosecuted until the 1st day of March, 1868; that among the terms upon which the latter was constituted, it was agreed that each should equally contribute to the capital, and share in the profits; and that the plaintiff should give his entire personal service to the management of the business and receive as compensation therefor eight hundred dollars per annum.

*Mr. Justice ASHE having been of counsel, did not sit on the hearing of this case.

The action, commenced on April 9th, 1874, against the said John W. Leak, and upon his death, in May, 1876, continued against the present defendant, Ann. C. Leak, his executrix, made a party in his stead, is for a settlement of the partnership matters and the payment to the plaintiff of what may be due him, and especially for the recovery for his services at the rate agreed on.

The defendant, John W. Leak, in his answer admits the formation of the first copartnership and the conducting of the joint business in the defendant's name, and for their common benefit, but denies that any such relations existed between them during the interval between September 10th, 1876, and March 1st, 1868, while it was carried on in his name, or that the plaintiff was to participate in the profits made; but that he was to be paid for his supervision and attention at the rate mentioned of eight hundred dollars per annum. He further alleges that a full settlement has been made, and the plaintiff has agreed to accept one-half of the net proceeds of the entire business in satisfaction of his claims, a large part whereof has been paid him, besides which he is entitled to one-half of one hundred dollars since collected, and a like portion of what may be made out of the uncollected effects in his hands. He further relies on the statutory bar as a defence.

In this stage of the proceeding a reference was made at spring term, 1875, and an account stated and reported by the referees at fall term, 1877, and a balance found due on November 5th, 1877, of $777.09.

The referees reach this result by finding that there has been a settlement of all matters connected with the business, except the compensation for the plaintiff's services, upon the basis of an equal division of the profits made in conducting the business in both names; that this compensation was to be paid by the firm and is not within the operation of the statute, and consequently one-half is to be charged against the deceased co-partner, and by giving the latter credit for one-half of an error discovered in the settlement, and half of the admitted collections.

The instrument upon which the claim for personal remuneration depends, and construed by the referees as "a partnership transaction," is as follows: "Memorandum of contract between John W. Leak and E. P. Covington, entered into 10th September, 1866:"

"The said E. P. Covington agrees to devote his individual attention to the business of J. W. Leak's store in the town of Rockingham for one year from this date, and the said Leak on his part agrees to pay the said Covington, for the faithful performance of his duties, the sum of eight hundred dollars per annum. The said Leak further agrees to allow the said Covington to take up such goods as his family may require, at cost. In witness whereof we have hereunto affixed our hands and seals.

September 10th, 1866. E. P. COVINGTON,
JOHN W. LEAK."

Exceptions were filed by both parties, that of the plaintiff being confined to the credit allowed the testator of $197, being one-half of the amount of the error detected in the computations made upon the settlement reported.

The defendant then tendered a series of issues to be submitted to the jury, involving the finding of the referees, of which the first only was accepted by the court in these words: Was the contract of eight hundred dollars for services, &c., which is mentioned in the pleadings and proof, a partnership transaction? The response of the jury was in the negative.

On the trial the written contract was exhibited in evidence and the deposition of the plaintiff read. There was no testimony offered by the defendant. The court charged the jury "that the paper-writing offered in evidence purported on its face to be an individual contract between the parties and not a partnership contract, but that in deciding the matter in controversy they must take into consideration the complaint, answer, deposition of Covington, the written contract, &c., and if considering all the evidence, they decide there was a partnership existing between the parties, they must then say whether this sum of

eight hundred dollars was a partnership transaction, or an individual transaction."

It is only necessary to notice two of the overruled exceptions of the plaintiff, of which one is to the instruction recited, and the other to submitting to the jury an inquiry as to a fact admitted in the pleadings.

The plaintiff has no just cause of complaint, inasmuch as the verdict concurs with the construction put upon the contract by the plaintiff himself in his complaint, as imposing an obligation upon the testator personally to be met and discharged, and not upon the partnership carried on in his name. In our opinion it was the duty of the judge to interpret and declare the import and character of the stipulation upon the face of the instrument, as imposing an individual liability upon the testator.

1. The entire structure of the instrument and the manifest but unperformed intent to make a covenant obligation, indicate a transaction by and between two separate and distinct persons, and not between one of them and a firm of which he was a member.

2. The first personal pronoun is used by each—the plaintiff agreeing to devote *his individual* attention to the business "and the testator agreeing on his part" to pay for the services to be rendered—language not appropriate to a contract made by two in an alleged copartnership conducted in the name of one.

3. The services are to be rendered "in the business of J. W. Leak's store," any reference to a firm being carefully avoided.

But the error is corrected by the finding, and the force of the objection removed.

The second exception rests upon a misconception of facts. There is no such concurrence in the pleadings as to the nature and effect of the contract for the payment of the plaintiff. He complains (Article 1) that the testator "was to pay," in addition to the half profits to be received, "the sum of eight hundred dollars per annum," while the testator declares in his answer (Article 8) that the plaintiff was to "receive eight hundred dol-

lars as set forth in the agreement," whereof a copy is annexed. The parties agree as to the existence and terms of the contract, but not on the point left to the jury whether it was to be paid out of the earnings of the business carried on as a firm, or out of the testator's own moneys.

But whether there are differences in the statement of the parties or not, the jury declare the contract to be personal to the testator, the court adjudicates upon this construction, and it is in accord with the plaintiff's own averments.

The plaintiff here objects that the jury were allowed to consider the complaint and answer in passing upon the inquiry left to them, but no specific exception to this portion of the charge is contained in the record, and it can scarcely be entertained in the form of a general and indefinite exception to the charge according to the established rules of practice.

But waiving the point, we do not see the force of the objection. The pleadings as such are not evidence, but the altercations of parties out of which are deduced issues as to material controverted facts to be submitted to and passed on by the jury. But they may become evidence, as admissions of a fact material to the issue when offered by the opposing party, and if they were not, the verdict of the jury obviates all objection to the charge based upon their reception. *Adams* v. *Utley*, 87 N. C., 356.

The claim for a salary as a distinct and actionable demand being excluded under the defence of the statute of limitations, the account upon a re-reference was corrected and judgment properly rendered for the defendant.

It must be declared there is no error in the rulings from which the plaintiff appeals. The final disposition of the cause will be made upon the defendant's appeal.

No error. Affirmed.

DEFENDANT'S APPEAL.

SMITH, C. J. The defendant's exceptions to the report of the referees, numbered respectively, 6, 7 and 14, overruled by the

court, are alone presented for our consideration in her appeal, and they are as follows:

6. For that the referees find that the plaintiff's liability for his deficiency in contributing his share towards the capital stock is embraced in the settlement made between the parties of May 13, 1865.

7. For that they have made no allowance for this deficiency.

14. For that no commissions are given the defendant for collecting the effects.

These points are all covered by the finding of the referees that the settlement embraced all matters affecting the parties, growing out of the conduct of the business in the names of the plaintiff and of the testator successively, whether the latter was for the common benefit of both, or for the sole benefit of the testator, except the charge for services, and we think this is fully warranted by the terms of that settlement. There is no error in the ruling in this respect, and the judgment upon the referred account must be affirmed.

No error. Affirmed.

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*MAY MURRILL and others v. D. A. HUMPHREY and others.

Guardian and Ward—Action, subsisting though not transferred.

1. The ward has a right to subject land sold by his guardian to the payment of the purchase money.
2. An action, not transferred to the new docket under sections 400 and 401 of the Code, is still a subsisting one until disposed of by a judgment.

(*Moore* v. *R. R. Co.*, 74 N. C., 528; *Small* v. *Small*, *Ib.*, 16; *Long* v. *Holt*, 68 N. C., 53; *Lord* v. *Beard*, 79 N. C., 5, cited and approved).

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*Chief-Justice SMITH did not sit on the hearing of this case.

MURRILL *v.* HUMPHREY.

MOTION in the cause heard at Spring Term, 1882, of ONSLOW Superior Court, before *Gilmer, J.*

The defendants appealed.

Messrs. Strong & Smedes, for plaintiffs.
Messrs. Allen & Isler, for defendants.

RUFFIN, J. The plaintiffs seek by their motion, made in a cause begun in the year 1851 in the late court of equity of Onslow county, to have their shares of the purchase money of the lands, then sold, declared to be a lien thereon, and to have the deed vacated as having been made by the commissioner without the sanction of the court.

With some few additions, the facts, as found by the judge below, are substantially the same with those set forth, as constituting the plaintiffs' claim in *Murrill* v. *Murrill,* 84 N. C., 182, which action grew out of the same transaction, and was brought to enforce the very rights now insisted on by the plaintiffs in this motion.

The additional facts found are: That after his purchase of the lands in 1851, A. J. Murrill became the guardian of Daniel R. and Mary J. Ambrose in 1854, and continued to act as such until their coming of age. Mary J. intermarried with one John F. Murrill in 1859, and died in 1870, leaving her surviving two infant children, the plaintiffs in this motion, May and Hugh A. Murrill, and upon the arrival at full age of Daniel R. in 1859, he conveyed his interest in the land, and the proceeds of sale to the said plaintiffs, Mary and Hugh A., who thereby became entitled to two-thirds thereof; that no order of the court was ever made directing title to be made to the purchaser, who, being a party to the proceeding, had notice thereof; and that he has since sold the land to D. A. Humphrey, who in turn has sold it to the defendant, A. H. Humphrey.

Upon these facts His Honor held that the plaintiffs had a right to look to the land as a security for the payment of their

money, and directed the land to be sold, in case the same was not paid by a given day, from which ruling the defendants appeal.

In the case referred to, in the 84th volume, it was held that the action as a new and independent action could not be maintained, upon the ground that the original proceeding was still pending, and the parties could, and therefore must seek their remedy in that. This, then, is a direct authority adverse to the position now assumed for the defendants, that that proceeding had abated by reason of the failure of the parties to bring it forward and have it docketed in the time prescribed by the statute.

The decision is clearly supported by *Moore* v. *Railroad Company*, 74 N. C., 528; *Long* v. *Holt*, 68 N. C., 53; and *Lord* v. *Beard*, 79 N. C., 5, in all of which it was held that the statute relied on (C. C. P., §§ 400 and 401) was not self-executing, but that the action, though not brought forward on the new docket, continues to pend as a subsisting action, in which the party must seek his remedy until it is actually abated by a judgment of the court, at the instance of some one interested in having it done.

Neither can the defendants avail themselves of the presumption of payment arising from the lapse of time. In the first place no such defence is set up in the answer of the respondent to the motion, nor is the plea of payment insisted on, but only that the bonds given by the purchaser had been exchanged for "other solvent bonds for a like amount." There is no evidence in the cause, and no finding that any such exchange of securities ever took place; but supposing it did, and that it was done with the sanction of the court, it could not take away the lien of the plaintiffs upon the land, as was expressly decided in *Small* v. *Small*, 74 N. C., 16.

In the absence of an express declaration to that effect on the part of the court, a purpose to surrender the lien, which an infant has upon the land sold for the payment of his purchase money, will never be presumed.

Besides this, the judge finds in terms that the makers of the bonds given for the purchase money are both insolvent, and this alone is sufficient to rebut the presumption of payment. It is true he does not fix the date at which their insolvency occurred, but we are bound to make every intendment in favor of his ruling, and it is for the appellant to show that there is, and not that there may be, error in the judgment appealed from.

No error. Affirmed.

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*JOHN D. BIGGS and another v. INSURANCE COMPANY (North Carolina Home).

Agent and Principal—Insurance.

1. One who deals with an agent must ascertain the extent of his authority to contract for the principal.
2. A provision in a fire policy rendering it void if the title to the property insured be changed in any way other than by succession by reason of death, or if the policy be assigned without written assent of the company endorsed thereon, is reasonable and just.
3. But it does not apply to a stock of goods disposed of in the ordinary course of trade, unless the sale be in mass, or a new member be admitted into the firm.
4. Whether the forfeiture of the policy extends beyond the insurance on the specific property sold, or the contract is entire (?).

(*Sossaman* v. *Ins. Co.*, 78 N. C., 145, cited and approved).

CIVIL ACTION tried at Fall Term, 1882, of MARTIN Superior Court, before *Gilliam, J.*

This is an action upon a policy of insurance against fire, issued by the defendant to one Bryant Wynn on the 1st day of October, 1880, in the amount of six hundred dollars for one year—one

*Chief Justice SMITH did not sit on the hearing of this case.

hundred dollars being for his store situate at Wynnville, in Martin county, and five hundred dollars for his stock of goods kept therein—the premium paid for the whole being twelve dollars. The store and goods were destroyed by fire on the 1st day of February, 1881.

Amongst other stipulations the policy contained a provision, that "if the title to the property be transferred or changed in any way other than by succession by reason of death, or the policy be assigned, or the property mortgaged, without written permission endorsed hereon, this policy should be void."

On the trial the following facts were agreed to as constituting the case.

On the 3d day of October, 1880, the said Wynn admitted one Mobly into partnership with himself and sold to him one-half of the stock of goods insured, and then in the store, and also by an endorsement on the policy assigned to him one-half interest therein. At the same time one Ewell, who was a solicitor of business for the defendant, signed an agreement printed upon the back of the policy, whereby he gave the assent of the defendant to such assignment—he having, however, no authority to bind the defendant by any such agreement.

After the destruction of the property, one Montgomery, who was an agent of the defendant, erased the name of Ewell from such agreement, and signed his own thereto. Wynn and Mobly afterwards assigned their interest in the policy to the plaintiff, in trust for the benefit of their creditors.

Upon these facts as admitted, the plaintiffs moved the court for judgment for the value of the goods destroyed, which His Honor declined to grant, being of the opinion that the sale of one-half of the stock of insured goods without the consent of the defendant, avoided the policy. The plaintiffs then moved for judgment for the value of the house burned, which was also declined. They then offered testimony to show that at the time he signed the instrument giving the assent of the defendant to the assignment to Mobly, Ewell represented to Wynn that he

had authority to do so, but this was excluded by the court. To these several rulings the plaintiffs excepted, and appealed from the judgment rendered.

Mr. Jas. E. Moore, for plaintiffs.
Messrs. Gatling & Whitaker, for defendants.

RUFFIN, J. Much of the argument before us was needless, since the case as agreed to expressly negatives the authority of Ewell to bind the defendant, and thus precludes every inference which might otherwise have arisen from his employment as its agent to solicit patronage. Nor could the fact that Wynn believed that he possessed such authority, when in fact he did not, affect the question of the defendant's liability.

When one deals with an agent it behooves him to ascertain correctly the extent of his authority and power to contract. Under any other rule, every principal would be at the mercy of his agent, however carefully he might limit his authority. It is true the power and authority of an agent may always be safely judged of by the nature of his business, and will be deemed to be at least equal to the scope of his duties.

There was, however, in this case no offer to show that the assent given to the assignment fell within the range of Ewell's duties as a solicitor, and, hence, we conclude that it did not do so. His bare assertion of such authority, contrary to his admitted want of it, could not commit the defendant to his act. The plain terms used in the stipulation against alienation of the property and the assignment of the policy, leave no room to doubt the intention of the parties, and this intention when not contrary to law must always govern.

Such a stipulation as this, as being both reasonable and just, has received the sanction of this court in *Sossaman* v. *Pamlico Ins. Co.*, 78 N. C., 145. Indeed, being founded upon the idea of enlisting the care and watchfulness of the insured in the protection of the property, by keeping unimpaired his interest

therein, it has been uniformly regarded as a conservative condition in policies, which merited the support of the courts.

Such a condition, avoiding the policy in case of a sale of the property, does not apply to a stock of goods kept for sale, and disposed of in the ordinary course of trade. The goods may be sold and replaced as often as the interests of the owner require, the policy meanwhile covering and protecting whatever may be on hand. But a sale of them in mass, or any diminution of the owner's interest therein, will, under the authority just cited, work a forfeiture, and so does any change in a partnership owning the goods, by which a new member is introduced. May on Ins. § 279. *Dey* v. *Poughkeepsie Mutual Ins. Co.*, 23 Barb. (N. Y.), 623.

The authorities are not agreed as to how far a breach of the condition, by a sale of a portion of the property, will affect the insurance upon that retained. Some of them hold that the forfeiture should not extend beyond the insurance on the specific property sold, while others maintain, that when the consideration paid is an entire one, the contract should likewise be an entire one, so that a breach as to part would affect the whole, though composed of different kinds and separately appraised. In May on Ins., §§ 277 and 278, the decisions bearing upon the point are all reviewed, and also in *Quarrier* v. *Peabody Ins. Co.*, 10 W. Va., 507. But it is not necessary that we should further advert to them or attempt to reconcile them, for according to no one of them is there a doubt, but that in a case like ours, in which the property insured consists of a single storehouse and the goods kept therein, a breach as to part will work a forfeiture as to the whole. In such case it is impossible to introduce any new element of carelessness by lessening the interest of the owner in one species of the property, so as to increase the risk thereof, without at the same time adding to the hazard of the other. Every risk that can attend the one must attend the other, and consequently the same rule must apply to both.

The contract in this case was an entire one—the premium

paid, a single amount—the application for the insurance on both the house and the goods, one act—and any misrepresentation as to one would have avoided the policy as to both. So that the court feels no hesitation in saying under which rule the case falls. The effort made after the loss to fix upon the defendant the consequences of having assented to the change of interest in the goods, by erasing the name of Ewell from the printed memorandum and adding that of Montgomery, was a plain confession of the former's known want of authority to give such assent. It was, moreover, an attempt to practice a gross fraud upon the defendant which no court will countenance.

The court concurs in every ruling made in the court below, and the judgment there rendered must be affirmed.

No error. Affirmed.

H. B. COVINGTON v. ROBERT J. STEELE.

Evidence—Action upon account for goods sold upon written orders.

In an action upon an account, made up of charges for goods sold upon written orders; *Held*, incompetent for the plaintiff to speak of their contents when the orders were not produced on the trial and identified.

(*State* v. *Swink*, 2 Dev. & Bat., 9; *Creach* v. *McRae*, 5 Jones, 122, cited and approved).

CIVIL ACTION tried at January Special Term, 1883, of RICHMOND Superior Court, before *Graves, J.*

The defendants appealed from the judgment of the court below.

Messrs. Frank McNeill and *Burwell, Walker & Tillett*, for plaintiff.

Mr. John D. Shaw, for defendants.

RUFFIN, J. The defendants take but a single exception, based upon the admission of certain testimony which they conceive to be incompetent. The facts connected with the exception are these:

The plaintiff sues upon an account, made up in most part of charges for goods sold to the defendants upon their orders. The plaintiff's deposition had been taken, in which, in response to questions put to him, he testified that he had sold the goods charged in the account to the defendants at the times and prices charged therein, and had delivered them to the defendants or their agents, or to their orders at the times at which they were so charged. The defendants objected to this evidence, at the time the deposition was taken, upon the ground that the witness ought not to be allowed to speak of the contents of the various orders mentioned in the account, by which goods purported to be sold and delivered, without the production of the written orders themselves. This objection was renewed when the deposition was offered to be read upon the trial, when the court held the evidence to be incompetent unless the orders had been produced at the taking of the deposition, or were produced and identified on the trial. Orders were then produced, some of which to the amount of $149.79 corresponded in date and amount with items charged in the account as having been sold on orders, while others differed in both particulars, being generally dated after the dates charged in the account. Other witnesses were then introduced, who deposed to having gotten goods of the plaintiff upon orders given them by the defendant; and the defendant, T. J. Steele, was himself examined as a witness for the plaintiff, and testified that he had signed certain orders on the plaintiff for the delivery of goods, which he identified.

After hearing this evidence, His Honor held the orders to be sufficiently identified and permitted the deposition to be read to the jury.

If the court could see that there was anything in the evidence tending even to identify the orders produced with those deposed

to by the plaintiff, we should feel ourselves bound by His Honor's ruling in the matter, upon the principle that whenever the admissibility of testimony depends upon a collateral question of fact (or as Judge GASTON says in *State* v. *Swink*, 2 Dev. & Bat., 9, upon an *inference of fact*) it is the duty of the judge to determine it, and his action is not the subject of review. *Creach* v. *McRae*, 5 Jones, 122.

So far, however, from that being the case, the direct effect of the whole evidence offered was, as we conceive, to disprove rather than to establish the identity of the orders. It is impossible to hold that the production of orders, differing in amounts and of subsequent dates, furnishes any evidence that they are the same with those deposed to by the witness, without something more to connect them.

The question is not upon the sufficiency of the evidence offered, to entitle the plaintiff to recover; for about that there could be but little doubt, if he had declared upon the account as a *stated account*, without undertaking to prove the several items, or if he had trusted to the witnesses introduced upon the trial to establish the orders as those upon which goods had been delivered. But the question is as to the competency of the plaintiff to speak of the contents of written orders, not present before him when his deposition was taken, and not produced at the trial and identified as those to which he then had reference; and this was not so much as insisted on.

The court thinks, therefore, that it was improper to admit the deposition of the plaintiff for the purpose of proving the unidentified orders, and as it cannot be known how far the jury were influenced by his testimony, there must be a *venire de novo*.

Error. *Venire de novo.*

*R. W. L. RAISIN & CO. v. S. M. THOMAS

Note must be produced before judgment entered—Jurisdiction—Counterclaim—Setoff, claim sounding in Damages.

1. Where the note in suit was given for two other notes which were not surrendered; *Held*, that the judge committed no error in allowing a verdict for the plaintiff and withholding judgment thereon until the notes were produced and filed in court.
2. The decision in *Meneely* v. *Craven*, 86 N. C., 364, to the effect that a counterclaim in excess of $200 cannot be entertained by a justice of the peace, affirmed.
3. Neither has a justice (nor the superior court on appeal) jurisdiction of a counterclaim in damages assessed, though voluntarily reduced to $200.
4. But where the court has jurisdiction, *it seems* that a claim sounding in damages can be used by a party as a setoff.

(*Shields* v. *Whitaker*, 82 N. C., 516; *Davis* v. *Davis*, 83 N. C., 71; *Boyett* v. *Vaughan*, 85 N. C., 363; *Meneely* v. *Craven*, and cases cited, 86 N. C., 364; *Love* v. *Rhyne*, *Ib.*, 576; *Francis* v. *Edwards*, 77 N. C., 271; *Lindsay* v. *King*, 1 Ired., 401, approved).

CIVIL ACTION tried at January Special Term, 1883, of RICHMOND Superior Court, before *Graves*, *J.*

The plaintiff's action, begun before a justice of the peace, is to recover the amount of a note of the defendant for the sum of $200, with interest thereon, from March 1st, 1877.

The defendant answered, denying the consideration of the note, and setting up a counterclaim, in which he states the note was given for a lot of worthless guano, sold to him by the plaintiff, and represented to be good, to his damage two hundred dollars; and further, a counterclaim for other guano sold him also worthless and under similar representations as to quality, to his damage three hundred dollars. These counterclaims are denied in the plaintiffs' replication.

*Mr. Justice ASHE having been of counsel, did not sit on the hearing of this case.

The cause was transferred by the defendant's appeal to the superior court, where the pleadings remained unchanged and issues were submitted to the jury, which, with the responses, are as follows:

1. What sum does the defendant owe the plaintiffs? Ans. Two hundred dollars, with interest.

2. What damages, if any, is the defendant entitled to on account of the matter set out in his alleged counterclaim? Ans. Two hundred and fifty dollars, with interest.

The defendant then proposed to remit the amount of the counterclaim found by the jury, in excess of two hundred dollars, to a sum sufficient to extinguish the plaintiffs' demand, and moved for judgment against them for costs. The court declined to do so, and rendered judgment for the plaintiffs upon their note, and the defendant appealed.

Messrs. Burwell, Walker & Tillett and *J. T. LeGrand*, for plaintiffs.

Mr. John D. Shaw, for defendant.

SMITH, C. J., after stating the facts. It is only necessary to notice two exceptions:

1. It was in evidence that the note in suit was given and accepted for two others, in the respective sums of $500 and $300, held by the plaintiffs, and the defendant, as an instruction, asked the court to tell the jury that the plaintiffs could not recover because they had not surrendered these notes upon bringing their action. The court refused so to charge, and said that the omission would not defeat the plaintiffs' right to have a verdict, but that judgment would be withheld until they were delivered up. The notes were produced and deposited with the clerk. The issue with the jury was as to the defendant's indebtedness, and the verdict responsive thereto could not be obstructed by the absence of the notes for which that in suit was given. The subsequent surrender of them for cancellation met all the equities

and rights of the defendant, and obviated all injurious consequences to him. The course pursued by His Honor was precisely that taken in *Shields* v. *Whitaker*, 82 N. C., 516.

2. The defendant's next and principal exception is to the refusal of the court to apply the damages, assessed and voluntarily reduced, to the extinguishment of the plaintiffs' debt, and the rendition of judgment therefor in favor of the plaintiffs.

Whether the asserted counterclaim rests upon a broken warranty of quality or practiced deceit and fraud, it is wholly for damages alleged in the answer and ascertained by the verdict to be in a sum beyond the cognizance of the court of a justice, and equally so of the superior court exercising its appellate jurisdiction. What the justice could not try, the superior court on the appeal could not try; and in both, the setting up a counterclaim, which in our system is but another action between the same parties reversed, should not have been entertained of such magnitude. The defendant could not sue on this claim before a justice, nor can he set it up in the form of a counterclaim in the plaintiffs' action. The merits of such a controversy are not committed to this inferior jurisdiction. The cases are numerous on point, and we content ourselves with a simple reference to some of them. *Davis* v. *Davis*, 83 N. C., 71; *McClenahan* v. *Cotten*, *Ibid*, 332; *Derr* v. *Stubbs*, *Ibid*, 539; *Boyett* v. *Vaughan*, 85 N. C., 363; *Meneely* v. *Craven*, 86 N. C., 364; *Love* v. *Rhyne*, *Ibid*, 576.

A counterclaim differs from a setoff, in that, while the latter defeats or diminishes the plaintiff's demand, the former not only does this, but the defendant recovers the excess if there be an excess of the plaintiff. C. C. P., § 101. *Francis* v. *Edwards*, 77 N. C., 271.

It is not necessary for us to determine whether such a claim sounding in damages can be used as a setoff, merely, since it is not brought forward as such, but strictly *as a counterclaim under the statute*. It was only admissible under our former practice when it was a money demand of a liquidated nature, and one

upon which an action of debt or *indebitatus assumpsit* would lie. *Lindsay* v. *King*, 1 Ired., 401. It may be enlarged under our present system, and we do not say it may not be used as a setoff for the purpose of discharging the debt when the court has jurisdiction.

In a case not dissimilar, where it was urged that, unless an inadmissible defence set up in a justice's court was allowed, the defendant might be deprived of the means of paying his debt to the plaintiff out of a debt due from the plaintiff to him, we said: We do not see why in such case the enforcement of the the plaintiff's judgment, in case of his insolvency, may not be restrained until the larger demand due the defendant can be determined, and then the adjustment made, when it does not conflict with the plaintiff's exemptions. *Love* v. *Rhyne, supra.*

There is no error in the ruling of the court and the judgment must be affirmed.

No error. Affirmed.

E. J. LILLY v. M. A. BAKER.

Pleading—Variance—Negotiable Instrument.

1. A variance between the allegation and the proof in a civil action is immaterial, unless it be shown to the court that the adverse party has been misled. C. C. P., § 128.

2. Negotiable paper endorsed by payee, and then appears the name of another person upon it; *Held*, that such person is an endorser.

3. An endorsement in blank should be filled, by order of court, before judgment rendered.

4. Effect of endorsement in blank at the time the note is made, and after its delivery to payee—upon negotiable and non-negotiable paper—liability of signers, whether bound as original promissors, guarantors or endorsers—application of the rule announced to "accommodation paper"—pointed out and discussed by ASHE, J.

(*Hoffman* v. *Moore*, 82 N. C., 313, distinguished; *Johnson* v. *Hooker*, 2 Jones, 29; *Shelton* v. *Davis*, 69 N. C., 324, approved).

LILLY *v.* BAKER.

CIVIL ACTION tried at Fall Term, 1882, of CUMBERLAND Superior Court, before *Gilmer, J.*

The plaintiff brought this action against W. B. Surles, A. J. Kivett and M. A. Baker, and alleges:

1. That on the 19th of May, 1877, the defendant, Surles, by his promissory note promised to pay said Kivett on the first of January, 1878, the sum of five hundred and four dollars, with interest at eight per cent. from date.

2. That Kivett endorsed the same to defendant, M. A. Baker, who endorsed it to the plaintiff.

The defendant denies each of the allegations of the complaint.

The plaintiff put in evidence the instrument sued on, which is as follows: On demand, the first of January, 1878, I promise to pay A. J. Kivett or order five hundred and four dollars, for value received of him, at eight per cent. interest—dated May 19th, 1877, and signed and *sealed* by the defendant Surles. It was endorsed first by Kivett and then by Baker.

The plaintiff testified that he received the note in its then condition from Kivett, and that the signature of Baker was in his own handwriting.

The defendant introduced no evidence, but asked the court to instruct the jury that there was a material variance between the complaint and the evidence, and therefore the plaintiff was not entitled to recover. This was refused, and the jury were told that if they believed the evidence, to find for the plaintiff. Defendant excepted.

Verdict for plaintiff; judgment; appeal by defendant Baker.

Mr. George M. Rose, for plaintiff.
Messrs. Hinsdale & Devereux, for defendant.

ASHE, J. The exception taken by the defendant that there was a material variance between the complaint and the evidence, cannot be sustained in any view of the case. It is not sustainable upon the ground that the complaint sets forth that the

instrument sued upon was a promissory note, and that put in evidence was a bond, for such a variance is not material in this case.

Section 128 of the Code provides that "no variance between the allegations in the pleading and the proof shall be deemed material, unless it shall actually have misled the adverse party to his prejudice in maintaining his action upon the merits. Whenever it shall be alleged that a party has been so misled, that fact shall be proved to the satisfaction of the court, and in what respect he has been misled; and thereupon the judge may order the pleading to be amended upon such terms as shall be just."

Here, there was no pretence on the trial that the defendant had been misled by the variance between the complaint and the evidence in this respect. The defendant knew that the note sued on was that given by Surles to Kivett and endorsed by him and the defendant: the amount, the date, and time of its maturity were all specially set forth, so that there could be no mistake as to the identity of the instrument; and it was not pretended that any other note, of like or any other amount, had ever been given by Surles to Kivett and endorsed by him and the defendant. If it had been shown on the trial that a promissory note had been given under similar circumstances, then there might have been ground for complaint by the defendant, that he was misled.

Nor do we think there is any more force in the ground pressed in the argument before this court, that the variance consisted in describing the defendant, Baker, *as endorser*, in the complaint, when the proof showed he was not an endorser.

It is well settled that where a note is endorsed in blank, by simply writing the name of the endorser upon the back of the note, the holder has authority to make it payable to himself or any other person, by filling up the blank over the signature. Parsons on Notes and Bills, 19. But he is not at liberty to write over the blank endorsement any words which shall change the liability

created by law upon the endorser, or at least none which shall not be in exact conformity to the agreement under which the endorsement was made by the endorser to the endorsee. Story on Promissory Notes, § 138. In such case the agreement or understanding of parties is always open to proof; but where there is no evidence of an agreement adduced, the endorsement is to be interpreted according to the principles of commercial law.

Whether a party who endorses a note in blank is to be held to be an original promissor, endorser, or guarantor, will depend upon the time of the endorsement and the character of the instrument endorsed: as for instance, if a note, whether negotiable or not, is endorsed at the same time the note itself is made, the endorser ought to be held as original promissor or maker of the note. But where the note is endorsed after its delivery to the payee, whether the endorser is to be held as an endorser or guarantor will depend upon the character of the note. If it is a note not negotiable, he is held to be a guarantor, but if it is a negotiable note and is endorsed in blank by a third person, not being the payee, or a prior endorsee through them, in the absence of any controlling proof it is presumed that such person means to bind himself in the character of an endorser, and not otherwise, and precisely in the order and manner in which he stands on the note. Story, *supra*, § 473—480.

"There is no doubt if a note be made payable to the order of the payee and endorsed by him, and then subsequent to his name appears the name of another person endorsed upon it, such person cannot be regarded in any other light than as an endorser." 1 Daniel Neg. Instr., § 707. To the same effect is *Bigelow* v. *Cotten*, 13 Gray, 309, where the maker, Hurlburt, made a note payable to himself or order, and upon the note was the signature of Hurlburt and under it that of Cotten, and on the trial it appeared that both names were signed before the delivery of the note to the plaintiff; *Held*, that the legal effect of the endorsement was to make the note payable to bearer, and although a

note payable to bearer is transferable by delivery, it may also be transferred by endorsement of the holder, and in such case the endorser incurs the same obligations and liabilities as an endorser of a note payable to order.

In *Givens* v. *Bank*, 85 Ill., 442, it was held that where the payee of a note endorses the same in blank, after which, it is endorsed in blank by the names of two other persons, one name just below the other, it will not be presumed they were joint-endorsers to the holder, but it will be presumed they were successive endorsers, and the second endorser may be sued alone without noticing the last endorser.

This case is altogether distinguishable from that of *Hoffman* v. *Moore*, 82 N. C., 313, and other cases of that class. There, the note was made by James Moore, and, without any endorsement of him on the back of the note, it was endorsed in blank by others. There was nothing to show that the legal title had been transferred by the payee to the endorsers, and it was properly held that the endorsers were liable as original promissors. But in our case, the bond, which is a negotiable instrument, was endorsed by the payee, Kivett, and then by the defendant, Baker, and the plaintiff as holder had the right to write over the signature of Kivett, the payee, an endorsement to Baker; and then over that of Baker, an endorsement to himself or any one he pleased, and may maintain an action against the endorser. *Johnson* v. *Hooker*, 2 Jones, 29. And this is so, even if the endorsement of Baker was made for the accommodation of Kivett. Parsons, *supra*, 27.

The court below, we think, was in error in rendering judgment without the filling up the blank endorsement, and the judgment is for that reason reversed, but the verdict will be allowed to stand.

The case is remanded that the endorsement may be filled up; after which, judgment may be entered. C. C. P., § 132; *Shelton* v. *Davis*, 69 N. C., 324. The reason why the courts are partic-

ular in having blank endorsements filled up before judgment, is, to avoid the danger of notes being subsequently endorsed and put in circulation.

Error. Judgment accordingly.

MOSES MITCHELL v. ANDERSON BROWN.

Pleading—New Trial—Inconsistent Verdict.

1. A pleading containing a denial—that every allegation of the opposite party "is corruptly false"—should not be received. The court condemn the use of the offensive languge, and say that the pleading should have been removed from the files and reformed, according to the established rules.
2. Where the verdict upon the several issues submitted is inconsistent, a new trial will be ordered.

EJECTMENT tried at Spring Term, 1882, of IREDELL Superior Court, before *Eure, J.*

The plaintiff appealed.

Messrs. Reade, Busbee & Busbee, for plaintiff.
Mr. D. M. Furches, for defendant.

SMITH, C. J. The complaint alleges the plaintiff to be owner and entitled to the possession of three contiguous tracts of land, each of which is particularly defined and described, containing in the whole one hundred and nineteen acres, and unlawfully withheld by the defendant, and asserts his right to recover the same with compensation for detention and waste committed.

The answer admits the defendant to be in possession of a part only of the land embraced in the plaintiff's boundaries, and, denying his title thereto, avers the same to belong to his father,

Henry Brown, who let him into possession, and under whom he holds as tenant.

The plaintiff put in a replication in denial of the allegations in the answer, and declaring that the statements contained in the second clause thereof, except as to the tenancy, are false, "and that every other part of the defendant's answer is corruptly false."

We reproduce this language imputing, in direct terms, the commission of perjury by the defendant, to mark our emphatic condemnation of its use in a pleading which ought to contain simple allegations or denials expressed in decorous terms and not be employed to give utterance to personal ill-will, or to make slanderous imputations. If this be tolerated, as crimination invites and provokes recrimination, the record may become the vehicle of personal abuse instead of being, as it is intended to be, a plain narrative of judicial action in a cause. The replication ought not to have been received with this offensive language, or, when discovered, should have been removed from the files until reformed and made consistent with the rules of pleading as prescribed in the Code; nor, we may add, do such accusations add to the force of a plain and simple statement of fact.

The defendant, at fall term, 1881, obtained leave to amend his answer, and made the amendment to the succeeding term, when the cause was tried. The amendment in substance alleges the prosecution of a former action by the defendant's lessor against the present plaintiff, in which, upon the pleadings, the title to the land now in suit was claimed by him and put in issue, and the finding upon the issue was against him, and thus upon the judgment rendered thereon the matter became *res adjudicata*, operating as an estoppel on the said Mitchell in respect to the title.

The issues submitted to the jury and their responses thereto are as follows:

1. Is the plaintiff the owner of and entitled to the possession of the land described in his complaint? Ans.—Yes.

2. Is the southern boundary of the plaintiff's land on the

line represented in the plat from figure 8 to 7; or is it from 4 to 6; or if not at either, where is it? Ans.—At the dotted line.

3. Is the land in controversy in this action, and no other, the same that was in controversy in the action of Henry Brown against Moses Mitchell, Gabriel Mitchell, Mexico Mitchell and Doctor Mitchell, tried at fall term, 1874, of Iredell superior court? Ans.—The same land, 1874.

Upon these findings, the plaintiff demanded judgment, which being refused and judgment rendered for the defendant, the plaintiff appealed.

We do not see the necessity for submitting a distinct issue as to the estoppel, since the defence could have been made under the first issue, and the record could have been used as evidence to show title of the plaintiff, and in answer to his claim of ownership. If his estate has been divested and transferred, whether by his own act of conveyance, or a sale under execution *in invitum*, or by this adjudication, the evidence in either case, and for the same reasons, would disprove the allegation of title in the plaintiff and lead to an adverse verdict upon that issue. The verdict, however, upon it is, that the plaintiff has title to all the land mentioned in his complaint, of which it is admitted in the answer this in dispute forms part, while the verdict upon the last issue identifies this part with that to which the defendant's lessor had before established title to be in himself by the adjudication; and thus an irreconcilable repugnancy exists between these findings. There is but one course to pursue, and we must set aside the inconsistent verdicts and order a new trial of all the issues. It is so ordered. Let this be certified.

Error. *Venire de novo.*

D. B. BURNS v. J. A. WILLIAMS and others.

Slander—Pleading.

1. In slander, the complaint must set out the actionable words spoken, not simply a narrative of what occurred on a certain occasion; and they must amount to a direct *charge*, not a mere *suspicion* of the commission of the alleged offence.
2. A complaint containing two unconnected alleged causes of action against different persons, is demurrable.

CIVIL ACTION for slander tried at Spring Term, 1882, of CHATHAM Superior Court, before *Graves, J.*

The action against the defendants is for verbal slander, and the complaint alleges two independent and separate causes of action. It sets out in detail, with the attending incidents, a conversation at the house of the plaintiff between his wife and the defendant, Oran Williams, on January 3d, 1881, the other defendants, his brother and brother's son, who had gone there with him, being present but saying nothing, the substance of which was that two hogs, belonging to the brother, Joseph Williams, had been missed, and defendant getting on the track, had traced it to that place; that thereupon an examination of the hog-pen was made by the defendants, Oran, and John A., but without discovering any of the lost property.

The complaint further avers that soon afterwards on the same day, the defendant, John A., overtook the plaintiff on the road, traveling in his wagon, and having halted him, the following conversation occurred:

The defendant inquired what the plaintiff had in his wagon, and was told it was pork. He again asked of what size, and was answered by the plaintiff that there were three shoats in a sack; the defendant remarked, if there were but one or two hogs he desired to see them; and he was then invited to make an examination and see for himself, which he declined to do; that

the defendant then proceeded to say substantially as follows: Two of my father's marked stock are gone; they were seen frequently lying in the bed and were caught not far from it and tied and thrown over stakes. I saw there the track of a wagon and I followed it as it passed near the place where the stakes were, and the hogs were put in the wagon; they were bound to be put in it and carried away, for the foot-prints of the hogs were nowhere seen leading off from the spot, and they did not have wings to fly. I then tracked the wagon, not knowing where it was going, but it appeared to be moving to the big road, and followed it to your house, where it stopped and could not be tracked any further. My father and uncle Oran and Ambrose Thomas are witnesses of these facts. I would have searched more carefully at your house, but for its confusing your wife—the hogs that I saw there were not of his stock. The plaintiff then moved on, and, the defendant following, added: You have caught further than you have a right to catch and further than I would have caught. I will go and see Robert Laster, and, being urged by plaintiff to do so, said, I reckon some of my party were there already, and if not, I will get some disinterested person to go, who could find out more than I can; if I go I am afraid of making some confusion, and will send one William B. Knight.

The conversation then ceased and the defendant rode away and the plaintiff proceeded on his journey.

The complaint then avers that by these "*acts, facts, conduct and declarations*, the defendants and each of them intended falsely and maliciously to charge the plaintiff with the felonious taking and carrying away of the hogs of the defendant, Joseph Williams, and to impute to him (the plaintiff) the crime of larceny, and they were so understood "by the persons (naming them) who were present and heard and saw what was said and done."

Answers were put in, and from the controverted allegations issues were eliminated and submitted to the jury, of which the

first two involved an inquiry into the truth of the allegations concerning the two interviews and conversations described, and the third was whether the crime of larceny is charged. The other two issues related to an alleged compromise and adjustment of the matter in dispute (pending the action and not necessary to be set out) and an inquiry as to damages.

Upon the trial, after the evidence had been heard and during the progress of the argument of the plaintiff's counsel before the jury, he was interrupted by a remark of the judge, who stated that he should instruct them that there was no testimony inculpating the defendant, Joseph Williams, and that the allegations in the complaint were not in themselves actionable so as to entitle the plaintiff to recover. The counsel, in submission to this intimation, suffered a nonsuit and appealed.

Mr. J. H. Headen, for plaintiff.
Mr. John Manning, for defendants.

SMITH, C. J., after stating the facts. It will be seen on examining the structure of the complaint (and we advert to it to avoid misconstruction from our silence) that it imputes the utterance of the alleged defamatory words to all the defendants and to each one of them, while its statement is that, of the three who went to the plaintiff's house in search of the missing hogs, but one of them, Oran, said anything, and the others were present but took no part in the conversation, and that only one of them, the defendant, John A., was present, and said and did what is alleged to have taken place on the road afterwards, in the hearing of the two witnesses named.

There are thus two unconnected alleged causes of action against different persons set out in the same complaint, a method of pleading finding as little support in the present, as in the former, system of procedure.

The complaint moreover does not specify the actionable words spoken, but gives a narrative of what occurred on two separate

occasions, consisting of expressions and acts, and undertakes to deduce therefrom an intention on the part of the one and the other defendant to charge the plaintiff with stealing the hogs.

We have in vain searched for any precedent for this form of declaration or complaint in an action for the utterance of actionable words. It is a fixed rule of pleading that the plaintiff shall set out, show a direct charge against himself of his commission of the imputed offence when the slander consists in this; or of the utterance of words, which in the light of other facts, are calculated and understood to convey such an imputation to those who may be present and hear. The language used must charge the crime directly, or have its meaning pointed by facts and circumstances which interpret its import. The complaint should be so drawn that the court, upon a demurrer or motion in arrest of judgment, can determine if a cause of action is charged, taking the facts averred to be true, and this without the aid of inferences to help them out.

In vain will we look in this complaint for any language, in either conversation, which alone, or in connection with the attending circumstances, shows that the plaintiff is charged with larceny. The conduct of the defendants, in association with what was said about the lost hogs and the trail of the wagon, indicates, at most, a suspicion that the plaintiff carried them away, but nowhere is it so charged by any one of them. Indeed a witness of the defendant present at the interview between the defendant, John A., and the plaintiff, testifying, says, that the latter declared that he did not accuse any one of taking them. We refer to this to show that the language used by him is not reasonably susceptible of a construction that amounts to a charge of larceny, and only evinces a suspicion that the plaintiff had taken and removed the hogs. But a suspicion lurking in the heart and manifested in one's conduct, is not the same thing as a charge of a committed criminal act, unless perhaps, when a suspicion is expressed in a form to impute, and understood to impute, the offence to which it points. A slanderous charge, however

disguised, may be detected in the words spoken, and will be actionable as if directly uttered. Even the words, "you are no thief" may be actionable, and are so if ironically spoken, as held in *Johnson* v. *St. Louis, &c.*, 65 Mo., 529.

The words, "I have a suspicion that you and Boon have robbed my house, and therefore, I take you into custody," were left to the jury under the charge, that if the jury found the defendant meant to impute to the plaintiff an absolute charge of felony, the plaintiff would be entitled to a verdict; but if they should think that he imputed a mere suspicion of felony, the verdict should be for the defendant. The jury found for the defendant, and upon a rule the charge of POLLOK, C. B., was sustained by a full court. *Tozer* v. *Mashford*, 6 Ex. (M. H. and G.), 539.

In our case the import of the language cannot, upon any reasonable interpretation, be extended to embrace an accusation of larceny, and this is manifest upon its face, and so to be declared by the court.

We sustain the ruling of His Honor upon the ground that there are no actionable words set out in either narrative, and none upon which can be impressed a meaning to impute a crime in the light shed, upon the transaction described, by the attending circumstances and antecedent facts. If the plaintiff has any remedy he has misconceived it in this action. It must be declared there is no error, and the judgment is affirmed.

No error. Affirmed.

EXUM GREEN and wife v. A. G. ROUNTREE.

Confederate Money—Trusts and Trustees.

The rule announced in previous decisions of the court, as to the acceptance and management of Confederate money by trustees during the late war, affirmed.

(*Cumming* v. *Mebane*, 63 N. C., 315; *Shipp* v. *Hettrick*, *Ib.*, 329; *Patton* v. *Farmer*, 87 N. C., 337, cited and approved).

CIVIL ACTION tried at Fall Term, 1881, of GATES Superior Court, before *Bennett, J.*

The plaintiffs sue for an account of the estate of the *feme* plaintiff, which came to the hands of the defendant as her guardian. The only question involved in the appeal is as to his liability for a sum of Confederate money, received in December, 1862, upon a bond secured upon personal security, and then solvent.

The facts of the case are as follows: A tract of land in which the *feme* plaintiff, then an infant and unmarried, had an interest, was sold under a decree of the court of equity of Gates county, the sale confirmed, and title made to the purchaser under the directions of the court—all this prior to the appointment of the defendant as guardian in 1857. After his appointment, the bond in question, which represented her interest in the land, was passed to him as guardian, instead of the money, under an express order of the court.

In December, 1862, the maker of the bond tendered the amount due thereon in Confederate currency to the defendant, and he accepted the same. This money he kept separate and apart from his own, and using no part thereof for any purpose until the spring of 1863, when, not being able to make any other investment, and acting under the advice of friends, he converted it into seven-thirty-interest-bearing notes of the Confederate

States, which notes he held as his ward's property, distinct from his own, and produced and identified the same on the trial.

At the time he received the Confederate money in 1862, it was current amongst the prudent business men of that section of the state, and was accepted by them in discharge of ante-war debts, even when well secured, and they also were in the habit of investing the same into like interest-bearing notes.

On the trial, at the suggestion of the court, but with the assent of both parties, the following issue was submitted, and responded to in the affirmative by the jury: "Did the defendant exercise proper discretion in collecting the bond in the fall of 1862?"

In instructing the jury, the court said to them, that "if a guardian in December, 1862, collected on a well secured ante-war bond Confederate money, and kept the same apart from his individual funds, and afterwards, in the spring of 1863, invested it in seven-thirty-interest-bearing Confederate notes, and if prudent business men in his part of the country, at that time, received such money in payment of their own well secured ante-war debts, then he would have exercised proper discretion, and would be guilty of no laches that would make him liable for the amount." Plaintiff excepted to this instruction.

Verdict and judgment for the defendant, from which the plaintiff appealed.

Messrs. Pruden & Shaw, for plaintiff.
Mr. L. L. Smith, for defendant.

RUFFIN, J. No fraud seems to be imputed to the defendant, but in the argument the case was made to turn solely upon the exception to the instruction given, as to the degree of care and diligence required of him in the collection and investment of his ward's money.

In both these particulars, the case comes directly within the rule laid down in *Cumming* v. *Mebane*, 63 N. C., 315; *Shipp* v.

Hettrick, Ib., 329; and *Patton* v. *Farmer*, 87 N. C., 337, and must be governed thereby.

These authorities clearly sustain the charge given to the jury in this case, their principle being that no trustee will be held for loss, who acts in good faith and manages his trust funds with that degree of diligence which prudent business men, similarly situated, use in the conduct of their own affairs.

As to the investment in other Confederate securities, of which complaint is made: It was his duty to invest the fund in some way, and the case discloses that he could find no other means of doing so, and in *Shipp* v. *Hettrick*, one of the very grounds upon which the trustee in that case was held responsible, was his failure to make the same investment of his trust fund in Confederate bonds, that he had done of his own.

We perceive, therefore, no error in the instructions given, or in the judgment of the court, and the same must be affirmed.

No error. Affirmed.

W. L. WHITE v. ANN JONES and others.

Confederate Money—Purchaser at Administrator's Sale—Rents—Betterments.

1. A bond executed in 1863, payable four years after date, which contains an express stipulation that payment in specie is not to be demanded, and the obligor at the time, instead of giving the bond, tendered a cash payment in Confederate money which was declined, is not solvable in Confederate currency. But it was not error, in this case, to reduce it to the amount of another bond to which the scale of depreciation was applied—the two bonds being made with reference to the same transaction, and with the understanding that what would pay the one should be taken in payment of the other.

2. Where A purchased land at an administrator's sale, and, after paying a part of the purchase money, assigned his interest to B, taking from him a promise to pay the balance due the administrator and his bond for the part A had paid, and B afterwards assigned to the plaintiff for a valuable consideration; *Held*, that the plaintiff, upon payment of the balance *due the estate*, is entitled to receive a deed from the administrator for the land, unencumbered with any lien in favor of A. But the amounts paid by A, after plaintiff acquired his equitable title, being such as the plaintiff must have paid to get the legal title, operate as liens upon the land.

3. The plaintiff, in such case, having the right to the land, is entitled to the rents and profits.

4. Betterments and reparation of the premises touched upon, and the distinction noted.

(*Smith* v. *Brittain*, 3 Ired. Eq., 347; *Bank* v. *Clapp*, 76 N. C., 482; *Wetherell* v. *Gorman*, 74 N. C., 603; *Smith* v. *Stewart*, 83 N. C., 406, cited and approved).

CIVIL ACTION tried on exceptions to a referee's report, at Spring Term, 1881, of WILKES Superior Court, before *Seymour, J.*

Mrs. Rachael Stokes died in Wilkes county in the year 1860, leaving a last will, in which she directed all of her property of every description to be sold upon a credit of twelve months, as soon as it could be conveniently done, after her death. She nominated her son, M. S. Stokes, as executor, and he procured the will to be admitted to probate, but died without executing any of the trusts contained therein, and thereupon one Jacob Fraley was appointed and qualified as the administrator *de bonis non* with the will annexed of Mrs. Stokes.

Acting under the power contained in the will, the said Fraley proceeded to sell at public sale, on the first day of January, 1863, all the property belonging to the estate of his testatrix, and amongst other things a valuable tract of land situate in said county, on the north side of the Yadkin river known as the "Old Stokes Homestead," which was bid off by the defendant Bledsoe and one W. P. Maxwell at the price of twenty-six thousand one hundred and eighty dollars.

On the 21st day of the same month, the said Bledsoe and Maxwell paid to the said administrator the sum of sixteen thousand one hundred and eighty dollars in Confederate money, and took from him the following receipt:

"Received of Jesse Bledsoe and W. P. Maxwell, sixteen thousand one hundred and eighty dollars, towards the purchase money of a tract of land sold at public sale, on the first day of January, 1863, it being the lands known as the Old Stokes Homestead, on the north side of the Yadkin river, containing three hundred and seventy-five acres of land. January 21st, 1863. (Signed) JACOB FRALEY, Administrator, &c."

At the same sale, Bledsoe and Maxwell also purchased articles of personal property, amounting to $1,395.99.

On the 6th day of March, 1863, Bledsoe and Maxwell sold and assigned their interest in said land to one Joseph Gray, the father-in-law of the plaintiff, and executed to him an instrument in words following:

"I, Jesse Bledsoe and W. P. Maxwell endorse our bid in the purchase of the Rachael Stokes farm on the Yadkin river, sold on the first day of January, 1863, to Joseph Gray. We transfer all our bids to Joseph Gray in everything purchased by us on the day of sale. March 6th, 1863.

(Signed) JESSE BLEDSOE,
W. P. MAXWELL."

At the same time they took from said Gray the following instrument:

"For value received, I promise to pay Jesse Bledsoe and W. P. Maxwell the sum of sixteen thousand one hundred and eight dollars, in payment of the Stokes land—the remaining part to be paid the administrator of the deceased for all the balance due from us (them) to the estate. Given under my hand and seal, the 5th day of March, 1863.

(Signed) JOSEPH GRAY, [Seal]."

In addition to the above, Gray promised to pay Bledsoe and

Maxwell an advance of $2,000 upon their bid for the property purchased by them at the sale.

On the 18th day of April, 1863, Gray offered to pay to Bledsoe and Maxwell the said sum of $16,180, so secured by his bond, in Confederate money, but they declined to receive the whole amount from him, and thereupon he paid them the sum of $10,680, in such money, and gave them another bond, as follows:

"Forty-five months after date, I promise to pay to the order of W. P. Maxwell and Jesse Bledsoe, the sum of seven thousand five hundred dollars, bearing interest from date at two per cent. for the first twenty-one months, the remaining time at six per cent., value received. Witness my hand and seal, thi sthe 18th day of April, 1863. The above amount not to be exacted in specie. (Signed) JOSEPH GRAY, [Seal]."

On the 27th day of July, 1866, the said Gray being insolvent, conveyed his interest in the land mentioned to one Job Worth, in trust to secure certain debts which he was then owing to one Bitting, and upon a failure to pay the same, the said Worth afterwards sold said interest at public sale, when the plaintiff became the purchaser at the price of $101, and took a deed therefor.

The said Maxwell having died, the defendants, A. B. Cox and F. J. McMillan, were duly appointed and qualified as his administrators, and on the 1st day of March, 1867, the said Fraley, as administrator with the will annexed of Mrs. Stokes, executed a deed, whereby he conveyed the same tract of land to the said Cox and McMillan, upon trust that in case the balance still due the said Fraley upon the original purchase money of the land should not be paid by the 1st of January, 1869, then they should sell the land, and after paying the said purchase money, to divide the balance equally between the defendant Bledsoe and the defendant heirs-at-law of the said Maxwell, deceased.

Shortly after the execution of this last mentioned deed, and before the adoption of the constitution of 1868, the said Cox

and McMillan instituted an action of ejectment, in which they were joined by all the heirs-at-law of the said Rachael Stokes, as plaintiffs, against the said Joseph Gray, for the possession of the said tract of land, and at fall term, 1869, of Wilkes superior court, recovered judgment against him, and soon thereafter evicted him and put the defendant Bledsoe in the possession of the land, who remained in possession, receiving the profits until the year 1877, when a receiver was appointed under an order of the court, rendered in this cause, who has ever since received the rents.

The administrator, Fraley, died in the year 1872, and soon thereafter the defendant, Q. F. Neil, was duly appointed administrator *de bonis non* with the will annexed of Mrs. Stokes.

The plaintiff asks that he may be declared by the court to be entitled to the equitable interest in the said land acquired by Bledsoe and Maxwell by their purchase from the administrator, Fraley, and that an account may be taken to ascertain how much is still due the estate for the purchase money therefor, and that upon the payment of the same, after applying the rents and profits received by the defendants in discharge thereof, he may have such conveyance made to him as may be necessary to perfect his title.

The defendant, Bledsoe, in his answer, alleges that it was expressly agreed between the plaintiff's assignor, Gray, and himself and Maxwell, that the bond given them on the 18th day of April, 1863, for $7,500, should be paid in good money, though specie was not to be demanded; and that note was drawn as it was, for the reason, that, in order to raise part of the money they paid to Fraley for the land, they had borrowed a like sum of $7,500 from one Edwards, and had given him their bond similar, as regards the time of its falling due and the rate of interest, with the bond taken from Gray, and that it was intended by the parties that the proceeds of the one should be used in discharging the other; and he insists that the plaintiff ought not to have title to the land sued for, until he shall pay off and discharge this bond of Gray, as well as the balance due to the estate

of Mrs. Stokes. He also alleges that after the assignment of their interest to Gray, he and Maxwell were called on to make payments upon the purchase money of the land, and that they did make such; and he insists that these sums should also be declared to constitute liens upon the land, to be discharged before the plaintiff shall be permitted to have the title thereto secured to him; and likewise, the sum due the estate upon their purchase of personal property.

The defendant heirs-at-law of Mrs. Stokes deny that the administrator, Fraley, sold the property, or that he had a right to sell it for Confederate money, and they insist that neither the plaintiff nor Bledsoe, who has since purchased the interest of Maxwell in the premises, is entitled to have the land without paying its value in good money, which they allege to be $10,000, and that the rents and profits, which have been enjoyed by Gray and Bledsoe, far exceed in value any and all payments that have been made upon the purchase money.

By consent of all the parties, the cause was referred to M. L. McCorkle, to take and state an account of all matters in controversy between them, and afterwards he was particularly directed to inquire and report as to the currency in which the bond for $7,500, given by Gray to Bledsoe and Maxwell, on the 18th of April, 1863, was solvable.

The referee made his report, setting forth his findings of fact and his conclusions thereon, as follows:

1. That Jacob Fraley, as administrator with the will annexed of Rachael Stokes, deceased, offered for sale on the 1st of January, 1863, at public sale, the lands mentioned in the pleadings, and that the defendant Bledsoe and W. P. Maxwell, now deceased, became the purchasers thereof at the price of $26,180, on a credit of twelve months.

2. That soon thereafter the said purchasers paid to the said administrator, in Confederate money, the sum of $16,180, less interest on that sum for one year, which amounted to $970, thus reducing the credit, to which they were entitled, to the sum of

$15,210, and leaving the balance of $10,970 still due on the purchase money of the land.

3. That the value of the land at the time, in good money, was $10,000, and deducting the payment made in the proportion of $10,970 to $15,209, it left unpaid of the purchase money the sum of $4,190.50 to be paid in good money.

4. That the defendant, Bledsoe, on the 2d of March, 1871, paid to said administrator, Fraley, towards the purchase of said land the sum of $1,000, and again on the 19th of June, 1871, the sum of $140, and these two sums taken from the interest which accrued up to the 1st of April, 1880, left due for interest at that time the sum of $3,001.33, which, added to the balance of principal due, made the sum of $7,391.83, due to the estate of Mrs. Stokes, as the purchase money of the land.

5. That said Bledsoe and Maxwell assigned their interest in the land to Joseph Gray, in consideration of the sum of $16,180, and a *bonus* to them of $2,000—the said Gray agreeing to discharge the balance of the purchase money for the land and the personal property purchased by them at the sale; and that in pursuance thereof the said Gray, on the 6th day of March, 1863, gave his bond to them for the said sum of $16,180, which bond he afterwards, on the 8th April, 1863, took up by paying them in Confederate money the sum of $8,680, and giving another bond for $7,500, payable forty-five months after date.

6. That the said sum of $7,500 was to be paid in good money, or such as could be used in discharging a debt of a similar character and for a like amount, which the said Bledsoe and Maxwell were owing to one Edwards.

7. That the said Edwards' debt was afterwards scaled, and by applying the same scale to the bond for $7,500, it would be reduced to the sum of $4,408.94, which, with interest to the 1st of April, 1880, gives the sum of $7,188.56, as being due thereon.

8. That Bledsoe and Maxwell purchased at the same sale personal property to the amount of $1,395.99, in Confederate

money, which, being scaled, gives the sum of $465.33, amounting, with interest to the 1st April, 1880, to $946.93.

9. That Bledsoe is entitled, for betterments put upon the land while in his possession, to receive the sum of $366.56.

10. That the defendant, Bledsoe, is entitled to have repaid to him the sum of $1,000, paid by him towards the purchase money of the land on the 2d of March, 1871, and the sum of $140 so paid on the 19th of June, 1871; thus making the sum due to him from all sources, with interest to the 1st April, 1880, to be $10,260.66.

11. That the defendant, Bledsoe, together with the son-in-law, who was the receiver appointed by the court, has received the crops made upon the lands for eleven years—that of the year 1869 being worth $740.

12. That the other crops from January 1st, 1870, to January 1st, 1880, after paying taxes and the necessary repairs, &c., were worth on an average the annual sum of $600—thus making the sum due from him for rents, with interest thereon, to be $8,882.10—which, deducted from the sum of $10,260.66, found to be due by him, leaves a balance of $1,378.56.

13. That the rents and profits of the land, from January, 1869, during which time the said Joseph Gray had possession of the premises, amounted to the sum of $6,000, which, with interest to the 1st of April, 1880, made the sum of $10,950.

14. That the sum of $7,391.83, found to be due to the estate of Rachael Stokes for the purchase money of the land, is a lien thereon, the title having been reserved until the payment thereof.

15. That the defendant, Bledsoe, and the estate of W. P. Maxwell, deceased, are still responsible to the estate of Mrs. Stokes for the personal property purchased by them at the administrator's sale in 1863.

16. That the defendant, Bledsoe, has also a lien upon the land, subject to the prior lien for the purchase money due the estate for the balance due him on the $7,500 bond, and other payments made by him towards the purchase money of the land, and also

for the amount due upon their purchases of personal property, as scaled.

17. That the legal and equitable title to the land is in the heirs-at-law of Mrs. Stokes and the defendant, Bledsoe, to be held by them in trust, until the sum of $7,391.83 is paid to the estate, and the sums of $1,376.56 and $946.93 are paid to the defendant, Bledsoe.

Exceptions to the report of the referee were taken by both parties.

By the plaintiff:

1. For that he erred in taking the value of the land in 1863, to-wit, $10,000, as the basis in ascertaining the balance of purchase money due after deducting the $16,180 paid by Bledsoe and Maxwell, and instead thereof he should have taken the price of the land in Confederate currency, and scaled the same at the rate of 3 for 1, and thereby the balance should have been $3,333.33⅓ and not $4,190.50, as reported.

2. For that he erred in holding the sum due to Bledsoe and Maxwell upon the $7,500 bond was payable in good money, and the same should have been treated as solvable in Confederate money.

3. For that he erred in holding the defendant, Bledsoe, to be entitled to the sum of $366.56, for betterments.

4. For that he finds, in paragraph 10 of his report, that the sum of $10,260.66 is due from Joseph Gray to the defendant, Bledsoe.

5. For that he finds that the rent for the year 1869, was only worth $740.00, whereas the evidence showed it to be worth $1,000.

6. For that he finds that the rents from January, 1870, to January, 1880, were worth only $600 per year, whereas the testimony shows them to have been worth $1,000 per year; and also, because in the 12th paragraph of his report the aggregate of the rents is applied to the payment of the debt, ascertained to be due the defendant, Bledsoe, from the said Gray, whereas,

it should have been applied to the payment of the amount due the estate of Mrs. Stokes for the purchase money of the land.

7. For that he finds in paragraph 14 of his report, that there is yet due for the land the sum of $7,391.83.

8. For that in the 16th paragraph he finds that the sums ascertained to be due the defendant, Bledsoe, constitute a lien upon the land as against the plaintiff.

9. For that he erred in finding that the legal and equitable title to the land in question, is in the heirs-at-law of Mrs. Stokes and the defendant, Bledsoe.

By the defendant, Bledsoe:

1. For that the referee deducted a year's interest from the cash payment of $16,180, made by Bledsoe and Maxwell.

2. For that he took the value of the land in 1863, as the basis for ascertaining the balance of purchase money due, instead of the price agreed upon in Confederate money, and scaling the same, whereby the true amount would be ascertained to be $3,333.33⅓.

3. For that he failed to give credit for the sum of $269 paid by Bledsoe to one Call, as agent of the administrator, Fraley, on the —— day of June, 1871.

4. For that he failed to charge the plaintiff with the sum of $269 in favor of the defendant, Bledsoe.

5. For that he charged the defendant, Bledsoe, with the rents of 1877, 1878 and 1879, when the same were in the hands of the receiver, and held by him under the orders of the court.

6. For that he failed to charge the plaintiff with the $7,500 bond, and interest at par, and only charged him with the sum at which the Edwards debt was settled.

7. For that the rents charged against the defendant, Bledsoe, for the years 1869, 1871, '72, '73, '74, '75 and '76, were excessive.

8. For that he finds that the defendant, Bledsoe, is still indebted to the administrator of Mrs. Stokes for the purchase money of the personal property bought at the sale in 1863—that matter not being in controversy in this action.

At the trial, the judge below sustained the first, fourth, seventh and ninth of the plaintiff's exceptions, and the first, second, third, fifth and eighth of the defendant's exceptions, and there was no appeal taken to the rulings thereon. He also sustained the plaintiff's third exception as to the sum allowed the defendant, Bledsoe, for improvements put upon the land, and overruled his second, fifth, sixth and eighth exceptions; and he sustained the fourth and seventh exception of the defendant, Bledsoe, fixing the rents for the years 1871, '72, '73, '74, '75 and '76, at $540 per year, and overruled his sixth exception.

From the rulings upon these several matters the plaintiff and the said defendant, Bledsoe, respectively appeal.

Messrs. J. M. Clement and *G. N. Folk*, for plaintiff.

Messrs. D. M. Furches, Merrimon & Fuller and *Robbins & Long*, for defendant.

RUFFIN, J. Without reference to the order in which they occur, the principal questions presented in the two appeals seem to be:

1. Whether the bond, mentioned in the record as having been given by Joseph Gray to the defendant, Bledsoe, and his associate in the purchase of the land, W. P. Maxwell, on the 18th day of April, 1863, for $7,500, was solvable in Confederate money, and therefore liable to be scaled, as prescribed in the statute, as is contended for by the plaintiff.

2. Whether it was proper, as was done by the referee, to reduce the amount to be paid upon such bond to the sum at which the said defendant and Maxwell were able to settle the debt, of a similar character, which they owed to one Edwards.

3. Whether the sum due upon said bond for $7,500, and the other sums paid by said Bledsoe and Maxwell upon the purchase money for the land, which is the subject of controversy, were rightly treated as constituting liens upon the same, which the

plaintiff must discharge before he can be permitted to have the title assured to him.

4. Whether the sums due from the defendant, Bledsoe, for rents, during his occupation of the land, are to be appropriated to the satisfaction of the amount ascertained to be due him, or to the debt still due the estate of Mrs. Stokes for the balance of the purchase money thereof.

As to the first. The bond, though dated in 1863, was made payable four years thereafter, and for half that period its rate of interest was fixed at two per cent., and for the other half at six, and it contains an express stipulation that *specie* was not to be exacted upon it. These circumstances would of themselves tend strongly to exclude the presumption, arising from its date, that its discharge in Confederate money was contemplated by the parties; and when to them we add the further fact, admitted to be true, that the obligor at the time, instead of giving the bond, tendered an immediate cash payment in Confederate money, and the same was declined, it would seem to be conclusive as to the point, and to show that it was not intended that the debt secured thereby should be paid in the then existing currency, already greatly depreciated and rapidly and constantly sinking in value.

Second. The testimony of the defendant, Bledsoe, himself, is the only evidence which bears upon this point, and it is to be observed that the same was received without objection. From it, it appears that having borrowed from Edwards some portion of the money with which they made their first cash payment for the land, and given him their bond therefor, Bledsoe and Maxwell desired to so shape and direct their debt upon Gray, contracted for the same land, as that it might afford them protection against the other, and that it was with this understanding and for this special purpose, that Gray was induced to change the form of his bond as originally given. With this view the two debts were made to correspond with one another, as to their amounts, their rates of interest, and their length of credit; and the conclusion seems irresistible, that it was the understanding

of the parties that what would pay the one should be taken in payment for the other.

Third. the original sale, at which Bledsoe and Maxwell became the purchasers, was in January, 1863, professedly upon a credit of twelve months, though upon an understanding, in fact, that in order to secure its payment in Confederate money, it should be sooner paid.

In March following they assigned their interest to Gray, taking from him a promise to pay the balance due the administrator, and his bond for a portion of the money they had themselves paid upon the land, which bond was in April following, surrendered and another taken, payable forty-five months after date; so that it is clear to be seen, that the intention and expectation of the parties were, that upon his paying to the estate the unpaid portion of the purchase money, Gray was to receive the title to the land, unencumbered with any liens in favor of his immediate vendors. Their assignment to him was an absolute and unconditional one, therefore, so far as it depended upon the intention of the parties and their contract; and in the same plight and condition he had a right to assign it, and did assign it; and in that condition it was acquired by the plaintiff; and we know of no principle of equity upon which, under such circumstances, he should be deprived of the full benefit of his acquisition.

The principle, so earnestly invoked for the defendant, that the purchaser of a mere equitable estate takes it subject to all attaching equities, has no application to the case, but it is rather a conflict between equities, and the question to be determined is—whose equity, the plaintiff's or the defendant's, is the superior one.

Ordinarily, in the case of such conflict, the rule of priority is the same as that which governs in the case of the transfer of legal estates, and preference would be given to that equity which was older in point of date. But as is said in Adams' Equity, 148, where neither party has the legal title, but the one *has a perfect equitable title by conveyance*, while the other *an imperfect*

one by contract, then a new principle is introduced, and that equity which grows out of a contract *in rem*, will be considered superior to the other, and preference will be given to it, though junior in point of time.

Applying this principle to the case in hand, there can be no longer any question between the parties as to whose equity the superiority attaches. The plaintiff derives his by a direct and unbroken line of conveyances, whereas the equity insisted on for the defendant, of postponing the plaintiff's until the debt on Gray is satisfied, grows out of no contract, but rather, as we have seen, is in defiance of his contract, and depends upon the supervening circumstance of Gray's insolvency.

Were Gray the plaintiff in the action, tendering the balance of the purchase money to the administrator, and seeking to have the title assured to him, then, the court might well, and doubtless would, withhold its aid until he had, as well, paid the debt due to his immediate assignor—and this, independently of any contract, and upon the principle that he who would have equity must first do equity.

But no such principle can affect the conscience of the present plaintiff, who, by contract and for a valuable consideration, has acquired an equity to the specific property, from one in whose power the defendant himself placed it freed from the lien of his debt, and whose equity is no matter of right growing out of a contract, but depends upon the mere benignity of the court.

Our conclusion, therefore, is, and it seems to be fully supported by the reason given for the decision in *Smith* v. *Brittain*, 3 Ired. Eq., 347, that it was error in the court below to hold that the debt due from Gray to the defendant, Bledsoe, on the $7,500 bond of the 18th April, 1863, constituted a lien upon the land in question, to be discharged by the plaintiff before he could be permitted to acquire the legal title from the administrator, and to this extent the judgment of that court is reversed.

As to the other sums paid by Bledsoe, to-wit: the $1,000 paid on the 2d March, 1871, and $140 on the 19th June, 1871, and

$269 paid June, 1871, they were paid after the plaintiff had acquired his equitable title, and were such as he himself must needs have paid before he could call for the legal estate; and, not having been officiously paid by the defendant, they constitute a clear equity against the plaintiff, and until discharged operate as liens upon the land. See *Bank* v. *Clapp*, 76 N. C., 482, a case on all fours with the present, as to this particular point, and strongly resembling it in many other of its features.

Fourth. The same reasoning, which secures for the equity of the plaintiff its preference over that of the defendant, must necessarily determine the question as to the proper application of the amount due for rents and profits in favor of the plaintiff. If the land be his, as we hold it to be, subject only to the debt due for the original purchase money, then it must follow that the rents are his; and no reason can be assigned why they should be appropriated to the satisfaction of a debt due the defendant, for which another, and not the true owner, is bound.

Virtually, the relation subsisting between the plaintiff and the heirs-at-law of Mrs. Stokes, since his purchase of the equitable interest, is that of mortgagor and mortgagee, and having by their action at law evicted him and put the defendant, Bledsoe, in possession, they are accountable to him for the rents, and must look to their tenant, Bledsoe, for the same.

As to the values of the rents, composing the subject-matter of the fifth and sixth of the plaintiff's exceptions, we affirm the ruling of the court below, not that we feel sure that the estimate is as high as the weight of the testimony would warrant, but that in the conflict between the several witnesses in regard to the matter, we are unable to say, with certainty, that it was too low.

Without determining the general question as to the right of a mortgagee, when called on to account for rents and profits received while in possession, to deduct for improvements put upon the premises, we feel constrained to affirm the judgment rejecting the claim for betterments in this particular case. The referee, in determining the question, seems to have been gov-

erned solely by the costs of the improvements, and not the enhanced value of the land by reason thereof. This, according to well settled authorities, is not the correct rule. *Wetherell* v. *Gorman*, 74 N. C., 603; *Smith* v. *Stewart*, 83 N. C., 406. As the defendant wholly failed, so far as the case shows, to offer evidence as to any enhancement in the value of the land, by reason of his improvements, whereby the error of the referee might be corrected, there is nothing left for the court, except to do as His Honor below did, and reject the charge altogether—and this we are the more ready to do, because, upon looking into the evidence, we find that the alleged betterments for which remuneration is sought, consisted rather of reparations than of additional improvements, and from his estimate of the annual rents, the referee expressly deducted the costs of repairs.

As to the sum due the defendant for the personal property re-sold to Gray, sought also to be made a charge upon the land, we deem it only necessary to say, that if the debt due for the land itself cannot follow it in the hands of the plaintiff, much less can that due for the personalty, which, so far as we can discover, never came to the plaintiff's possession, or was ever claimed by him.

This court, therefore, sustains the 6th and 8th exceptions taken by the plaintiff, and doth declare that the land in controversy is subject to no lien in favor of the defendant, Bledsoe, for his debt, due from Gray upon the bond given the 18th of April, 1863, though it is subject to a lien in his favor for all other amounts paid by himself or Maxwell towards the purchase money thereof.

It is also declared, that the plaintiff is entitled to credit upon the debt due the defendant, Neil, as the administrator of Mrs. Stokes, for the balance of the purchase money for the rents ascertained to have been received by the defendant, Bledsoe, and such as are in the hands of the receiver appointed by the court, and, subject to such credits, the said debt due the administrator is the first lien upon the land.

All other exceptions taken to the rulings of the judge below, whether by the plaintiff or defendant, are overruled.

There will be a referee to the clerk of this court to reform the account in conformity with this opinion, and the judgment of the court below, so far as the same was not appealed from; and the plaintiff will recover of the defendant, Bledsoe, the costs of both appeals.

PER CURIAM. Judgment accordingly.

L. LEVENSON & CO. v. HENRY ELSON and another.

Injunction and Receiver—Trial.

1. The appointment of receivers is regulated by section 215 of the Code: where the applicant establishes an apparent right to property in dispute, which is in possession of the adverse party, and the same is in danger of being lost or materially injured, a receiver may be appointed before judgment. The solvency of the trustee here warranted the court below in refusing the motion.
2. Allowing or refusing additional affidavits after argument begun, in such case, is matter of discretion in the presiding judge, and not reviewable.

(*Smith* v. *Smith*, 8 Ired., 29; *Long* v. *Logan*, 86 N. C., 535; *Long* v. *Gooch*, *Ib.*, 709; *Wiggins* v. *McKoy*, 87 N. C., 499; *Morris* v. *Willard*, 84 N. C., 293, and cases cited; *Thompson* v. *McNair*, Phil. Eq., 121; *Twitty* v. *Logan*, 80 N. C., 69; *Horton* v. *White*, 84 N. C., 297; *Irwin* v. *Davidson*, 3 Ired. Eq., 311; *Lyerly* v. *Wheeler*, Busb. Eq., 267; *Dunkart* v. *Rinehart*, 87 N. C., 224, cited and approved).

MOTION for injunction and receiver, in an action pending in CUMBERLAND Superior Court, heard at Chambers on the 7th of February, 1883, before *MacRae, J.*

The plaintiffs appealed.

Messrs. T. H. Sutton and *R. S. Huske*, for plaintiffs.
Messrs. N. W. Ray and *Hinsdale & Devereux*, for defendants.

SMITH, C. J. The defendant, Henry Elson, on December 12th, 1882, made an assignment of his stock of goods, wares, merchandise, evidences of debt and other effects, used in the business carried on by him, to his co-defendant, Robert M. Nimocks, in trust to secure certain enumerated and preferred debts, some of them due the trustee himself, and others on which he was surety, and again some due his wife and a relative, and in trust as to any residue after their satisfaction for other creditors.

The plaintiffs and others associated with them since the commencement of the suit, on behalf of themselves and other unsecured creditors who may become parties, impeach the assignment for fraud, alleging that it was executed to cover up the property of the debtor for his use, and some of the debts are fictitious, and they ask that the conveyance be declared covinous and void, and the property taken and appropriated to the payment of all the debts of the assignor.

To this end, after the grant of a temporary restraining order, an application was made to the judge of the district at Chambers, on February 7th, 1883, for the appointment of a receiver to take charge of, manage and dispose of the property, and for an injunction against the trustee to prevent his interference therewith until the final hearing of the cause upon its merits.

Upon this trial the complaint and answer, as well as numerous affidavits taken by the respective parties, were read in support of and in opposition to the plaintiffs' motion, whereupon it was refused and the restraining order previously issued vacated, and from this judgment the plaintiffs appeal.

The evidence fully shows the solvency of the trustee, and his ability, out of his own estate, to answer any demands which may be established against him for the management and disposition of the trust estate, and that the agent to whose hands it has been

committed is competent to conduct the business and entirely trustworthy.

Several exceptions were taken during the progress of the inquiry by the appellants and overruled, to-wit: to the liberty given the defendants to file additional affidavits after the argument had begun; to the denial to the plaintiffs of their application to furnish additional corroborative evidence; and to the refusal to allow further time to the plaintiffs to procure it; of which we have only to say that the action and rulings of the court are within the scope of the discretion confided to him in the conduct of the proceeding, which the appellate court cannot undertake to supervise. *Smith* v. *Smith*, 8 Ired., 29; *Long* v. *Logan*, 86 N. C., 535; *Long* v. *Gooch*, *Ibid*, 707; *Wiggins* v. *McCoy*, 87 N. C., 499. Nor, if we had the right to revise the rulings of the judge, do the facts contained in the record furnish sufficient reasons for our doing so.

The main and essential question argued before us, relates to the refusal of the court to put the assigned effects in the hands of the receiver, for the purpose of securing them, to abide the results of the suit. The defendants' counsel asserted the *bona fides* of the deed and the integrity of the transaction of which it is the offspring, denying that the alleged fraud sufficiently appeared from the circumstances in evidence to warrant and require the interposition of the court for the safety of the trust fund. We are not called upon to pass on the validity of the assignment in this collateral inquiry and upon mere *ex-parte* affidavits: we interpose only when it is manifest that the fund is mismanaged and in danger of being lost, or when the insolvency of an unfit trustee is present or imminent.

When a disputed fund is in possession and under the control of the court, and the right of a claimant is doubtful, it will be retained until the determination of the controversy, and it can be ascertained to whom it belongs. *Morris* v. *Willard*, 84 N. C., 293, and cases there cited; *Ponton* v. *McAdo*, 71 N. C., 101.

The rule is quite as well settled that, unless in case of threat-

ened irreparable damage or loss of the fund, it will be suffered to remain in the hands of the party who in law is entitled to its custody and care. *Thompson* v. *McNair*, Phil. Eq., 121.

There is no sufficient ground suggested for our depriving the trustee selected by the assignor, and of whom no complaint comes from the secured creditors, of the possession of the property, and thus disabling him to carry out the declared trusts of the deed, even if it was rendered probable that the conveyance would be hereafter adjudged to be fraudulent, since a responsible trustee is accessible to the claims of the successful litigant, whichever party may ultimately prevail in the contest.

"The matter of the appointment of a receiver to take charge of the property in litigation pending the suit," in the language used in *Twitty* v. *Logan*, 80 N. C., 69, "is regulated by statute. A receiver may be appointed before judgment on the application of either party, when he establishes *an apparent right to property* which is the subject of the action, and which is in possession of an adverse party, and *the property or its rents and profits are in danger of being lost or materially injured or impaired.*" *Horton* v. *White*, 84 N. C., 295.

The rule in respect to trespass is to enjoin only when the damage may be irreparable, and no other adequate redress can otherwise be had. *Irwin* v. *Davidson*, 3 Ired. Eq., 311; *Lyerly* v. *Wheeler*, Busb. Eq., 267; *Dunkart* v. *Rinehart*, 87 N. C., 224.

There is no error. This will be certified.

No error. Affirmed.

T. COVINGTON v. S. H. THREADGILL, Adm'r.

Contract—Illegal Consideration—Selling Liquor on credit.

1. A contract made in violation of a penal statute is deemed to be illegal, and will not be enforced by the courts. Where such a contract furnishes a consideration of another promise, the latter will also be deemed illegal, even though it may be partially supported by other and legal considerations.

2. The penalty denounced by Bat. Rev., ch. 81, § 4, against one who sells liquor, on credit, in violation of the statute, is not limited to a forfeiture of the excess over the sum of ten dollars, but extends to the whole amount of "money credited."

(*Sharp* v. *Farmer*, 4 Dev. & Bat., 122; *Ramsay* v. *Woodard*, 3 Jones, 508; *Melvin* v. *Easley*, 7 Jones, 356; *Clemmons* v. *Hampton*, 64 N. C., 264, cited and approved).

CIVIL ACTION tried at Fall Term, 1881, of ANSON Superior Court, before *Graves, J.*

The plaintiff declares upon three notes, given him by the defendant's intestate, and also upon an open account.

The first note, dated in September, 1877, is for $49.95; the second, in November, 1877, for $40; and the third, in May, 1878, for $25. The account is a running one, commencing in May, 1878, and closing in September of that year, and is for $43.45.

The evidence was that the plaintiff was a licensed retailer of spirituous liquors in the town of Wadesboro, keeping also for sale cigars, tobacco, confectioneries, bacon and other groceries. The defendant's intestate was in the daily habit of buying spirituous liquors from him by the small measure, and drinking it in the shop, and often drunk to intoxication. At such times the plaintiff's custom was to charge the drinks as they were sold, upon strips of paper, which he would present to the intestate as soon as sober, and take his note therefor. Intestate would buy other articles which were charged in the same way, and also incor-

porated in the notes. The notes sued on were taken in this way, the greater part of each being for liquors sold, though exactly what part was for liquor and what for other things the witness (plaintiff) could not tell. They were not witnessed or taken in the presence of a witness. The open account was exclusively for liquors, the most of which was sold by retail.

The defendant requested the court to instruct the jury, that inasmuch as the notes sued on were given for liquors sold to his intestate by retail, and on a credit for a greater amount than ten dollars, the plaintiff, being a licensed retailer at the time, could not recover any part thereof, notwithstanding they were partly given for other articles, the sale of which was not prohibited. This instruction the court declined to give, but told the jury that if the notes were given in settlement of accounts made up partly of liquors sold, and partly of unprohibited articles, they should ascertain how much was given for liquors and how much for other articles, and as to the latter they should render their verdict for the plaintiff; and further, in case they should believe that the consideration of the notes consisted of liquors sold to the intestate, on a credit to a greater amount than ten dollars, that then they might return a verdict for the plaintiff, on account of the liquors thus sold, to the said amount of ten dollars.

The verdict was in conformity with the instructions given, and after judgment thereon, the defendant appealed.

Messrs. Hinsdale & Devereux, for plaintiff.
Messrs. J. A. Lockhart and *Burwell & Walker*, for defendant.

RUFFIN, J. The defence rests upon the act of 1798 (Bat. Rev., ch. 81, § 4), which declares that "no retailer of liquors by the small measure shall sell to any person, on credit, liquors to a greater amount than ten dollars, unless the person credited sign a book or note in the presence of a witness in acknowledgment of the debt, under the penalty of losing the money so credited,

and that in any action brought for the recovery of such debt, the matter of defence allowed by this section may be set up in the answer and given in evidence."

The policy of the statute need not be commented on. It is such as has commended itself to the law-making power of the state, and the courts are in duty bound therefore to give effect to it, and it is not expected that any case will occur which will better serve to illustrate the wisdom of that policy and the necessity for its enforcement, than does this one between these parties.

The effect of the statute was not correctly apprehended by His Honor. The penalty which it denounces against one, who violates its provisions, is not limited to a forfeiture of the excess over and above the sum of ten dollars, but extends to the whole "*money credited*," as well that below, as above, that sum. Such seems to us to be the plain import of the words used in the act, without in any degree straining or detracting from their natural meaning.

The plaintiff, however, insists, and His Honor evidently inclined to that opinion, that inasmuch as the statute does not in positive terms declare the act of selling, though upon a credit and in excess of the designated amount, to be *unlawful*, but simply prescribes a penalty for it, its effect is not to make the selling so absolutely illegal, as that it will vitiate the whole of the note, or other contract, of which it may form, in part, the consideration. A distinction, like that attempted to be made, between the effect in this regard of statutes which affirmatively declare acts done in contravention of their provisions, to be *unlawful*, and those which merely visit such acts with penalties, has been at times, and perhaps still is, recognized in some of the authorities, but never in the courts of this state.

In *Sharp* v. *Farmer*, 4 Dev. & Bat., 122, the very point was made, and the court say, that after considering a vast number of cases upon the subject, they deem the law perfectly settled, that no action will be sustained in enforcement of an executory con-

tract founded upon an immoral consideration, or one against the policy of the law, the due course of justice, or the prohibition of a penal statute, and that a distinction between acts *malum in se* and *malum prohibitum*, could no longer be admitted as sound in principle, for that, the law would be false to itself, if it allowed a party through its tribunals to enforce a contract made against the express provisions of a statute; and accordingly in that case, it was held that no action could be sustained upon a promise to settle the estate of an intestate without taking out letters of administration—there being a statute which declared that no person shall enter upon the administration of any deceased person's estate until he has procured letters of administration, *under the penalty of one hundred dollars*, one-half to the informer and the other half to the state. A similar decision was made, with reference to a contract made in violation of the provisions of the same statute, in *Ramsay* v. *Woodard*, 3 Jones, 508; and in *Melvin* v. *Easley*, 7 Jones, 356, it was conceded by the whole court, though they differed as to other points, that a contract made on Sunday was *illegal*, and could not support an action, upon the ground that the act of 1741 (Bat. Rev., ch. 115, § 1) declared that "no person shall on Sunday exercise the work of his ordinary calling, upon pain that he should forfeit and pay one dollar, and it was expressly said that no distinction could be admitted between contracts made in contravention of the policy of the law, whether *malum in se* or *malum prohibitum*.

With these precedents to govern us, emanating from our own court and so manifestly in point, we cannot hesitate to declare our opinion that the sale of liquors made by the plaintiff to the defendant's intestate was illegal, because done contrary to the declared policy of the law, and in direct violation of its express provision. Being thus illegal, so that no action in affirmance of it can be sustained by the courts, it taints and violates any contract into which it enters, or forms any part of the consideration. No principle is now better settled than this: That if a single contract be made on several considerations, any one of which is

illegal, then the whole promise is void, because every part thereof is induced and therefore affected by the illegal consideration. *Clemmons* v. *Hampton*, 64 N. C., 264. 1 Smith's L. C., 502. And this consequence would seem to follow in this case, whether we treat the statute as annulling the whole contract for the sale of liquors, or only so much of it as was in excess of the ten dollars; for in either case, there would still be an illegal consideration entering into and relied upon to support each and every one of the promises sued on.

The court, therefore, thinks there is error in the judgment, and the same is reversed and a *venire de novo* awarded to the defendant.

Error. *Venire de novo.*

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*E. F. ASHE v. J. T. GRAY.

Jurisdiction—Action for Deceit.

An action for deceit and false warranty in the sale of a horse is cognizable in the superior court, though the damages claimed amount only to fifty dollars. (*Scott* v. *Brown*, 3 Jones, 541; *Bullinger* v. *Marshall*, 70 N. C., 520; *Froelich* v. *Express Co.*, 67 N. C., 1, cited and approved).

CIVIL ACTION tried at Fall Term, 1882, of ANSON Superior Court, before *Gilmer*, *J.*

The plaintiff appealed.

Messrs. J. A. Lockhart and *Hinsdale & Devereux*, for plaintiff.
Messrs. J. D. Shaw and *Little & Parsons*, for defendant.

SMITH, C. J. The plaintiff's complaint pursues the form of a declaration in the old practice, and contains causes of action

*Mr. Justice ASHE did not sit upon the hearing of this case.

for deceit and fraudulent representation, associated with a cause of action for a false warranty in an exchange of horses with the defendant. It is alleged that the defendant both represented and warranted the horse sold to the plaintiff to be gentle and kind in harness, and not addicted to the vicious habit of kicking, well knowing at the time the fact to be otherwise, and as the plaintiff found out in using him.

For this fraud and deceit and breach of warranty the plaintiff brought his suit in the superior court for the recovery of damages in the sum of fifty dollars.

The defendant denies making any warranty, and says, while he does not recollect if he described the horse as kind in harness, he had no knowledge of any vicious habits possessed by him, and if he showed any such and kicked when driven, it was from mismanagement and want of care in the person who drove.

Issues were accordingly submitted to the jury, which, with the response to each, are as follows:

1. Did the defendant warrant the horse not to kick? Ans.—Yes.

2. What damage, if any, has the plaintiff sustained? Ans.—$50 and interest from the time of bringing suit.

3. Did the plaintiff, by his own conduct, contribute to his damage? Ans.—No.

Upon the rendition of the verdict, the court being of opinion that the action was founded on contract, and was exclusively within the original cognizance of a justice of the peace, refused to give judgment for the plaintiff, and dismissed the action, from which ruling the plaintiff appeals.

In *Scott* v. *Brown*, 3 Jones, 541, the action was for deceit in the sale of a jackass, and NASH, C. J., distinguishing between the classes of actions which arise *ex contractu* and *ex delicto*, assigns an intermediate place to this, and denominates it "an action *quasi ex contractu*," in which the defendant may, as in those of the first mentioned class, take advantage of the non-joinder of one, who as a party to the contract ought to be under the rules

of pleading a co-plaintiff under the general issue at the trial, as if it were strictly an action *ex contractu.*

Again, in *Froelich* v. *South. Ex. Co.*, 67 N. C., 1, where the plaintiff sought, in an action for a tort in not conveying and delivering at Hartford, in Connecticut, a barrel of wine, valued at $160, a recovery in damages, it was held, that inasmuch as the tort resulted from the relations created by the contract to convey the wine, it stood upon the footing of an action founded on the contract of bailment, and, under the constitution, fell under the jurisdiction of a justice.

But the deceit practiced in connection with the sale, and inseparable from it, the gist of the present action, does not grow out of relations created by contract, but forms a distinct and independent cause of action, and, therefore, as in other torts, is cognizable in the superior court. This is expressly decided in *Bullinger* v. *Marshall*, 70 N. C., 520, an action for deceit in the sale of a mule, in which a nonsuit had been moved in the superior court for want of jurisdiction, as the damages were put at only one hundred dollars. Delivering the opinion, the Chief-Justice remarks: "So if there be a warranty of soundness in the sale of a horse, the vendee may sue upon the contract of warranty, and the justice of the peace has jurisdiction, or may declare in tort for a false warranty and add a count in deceit, in which case a justice of the peace has not jurisdiction, the plaintiff being permitted to declare collaterally in tort for a false warranty in order to enable him to give in a count for the deceit, which, of course, was in tort." He announces, as the result of the inquiry, that the jurisdiction of a justice does not extend to any matter collateral, although it grew out of the contract, for in such case the action is not "*founded on contract*" in the sense of the constitution, which defines the jurisdiction.

If the issues and the responses of the jury were commensurate with the case made in the complaint, and covered all the causes of action therein contained, we should concur in the ruling that the superior court had not jurisdiction, for the claim to a recov-

ery would rest wholly on the contract of warranty. But the complaint is for a tort, to which is annexed a cause of action based on a false warranty according to the former usage and practice, which did not change the character of the action as still one *ex delicto*, for the reason, perhaps, that a false warranty was also a false representation, and partook of the nature of a deceit. We are not disposed to adopt a more stringent rule in our present pleadings, and we should hold that such a joinder of causes of action would not be subject to demurrer under C. C. P., § 95.

It is plain that in a suit upon a violated contract, or for goods sold and delivered, or services rendered at no specific sum agreed on therefor, where the damages are laid in the complaint above, and are reduced by the verdict below, the sum which determines the jurisdiction, the action cannot be dismissed, because it is the sum demanded and not the sum awarded which controls, by the very words of the constitution. The jurisdiction fully appears in the complaint, and it would be strange if it were lost, because the finding is upon allegations which separately might not admit of the suit.

We think, that whatever independent cause of action can be associated with other causes of action in the same complaint, the rendering of the verdict upon that warrants the rendering the appropriate judgment, and does not oust the acquired jurisdiction. As it attached in the beginning, so it adheres to the ultimate disposition of the cause and the controversy.

There is error, and judgment will be here entered upon the verdict.

Error. Reversed.

B. T. JOHNSON and others v. A. D. ROYSTER and others.

Taxation—Principal and Agent.

1. Property cannot be listed or taxed for any year preceding a current year.
2. The act of 1879, authorizing the collection of taxes and arrears due the city of Raleigh for the three years preceding its passage, does not confer the right to collect a tax upon property not listed according to the law.
3. Ratification of the act of an unauthorized agent must, in order to bind the principal, be made after a full disclosure of all the facts and circumstances attending the transaction.

(*R. R. Co.* v. *Com'rs*, 77 N. C., 4, and 82 N. C., 259; *Sudderth* v. *Brittain*, 76 N. C., 458; *Taylor* v. *Allen*, 67 N. C., 346, cited and approved).

APPEAL from an interlocutory order made at June Term, 1882, of WAKE Superior Court, by *MacRae, J.*

The facts as set forth in the pleadings and the accompanying affidavits, are as follows: The plaintiffs, who are residents of the state of Maryland, own, and have owned for several years, a lot of land situate in the city of Raleigh, which they have been accustomed to list for taxation through their agents, Messrs. Battle and Batchelor, and in their names "as agents." After listing the land for the year 1876, and paying the tax for that year they ceased to act as agents for the plaintiffs, and consequently the land was not given in by any one, or entered at all upon the tax-lists for the year 1877.

In 1878, the plaintiffs appointed W. J. Saunders as their agent, who, in June of that year and upon being informed by the clerk of the city that it had not been listed for the year previous, authorized that officer to enter it upon the list of 1877, and in the names of the former agents, which was accordingly done—the tax being fixed according to its previous assessment, at $66.67.

The plaintiffs gave no authority to their agent, Saunders, to list the land for the year 1877, nor had they any knowledge of

his having done so, or of the fact that it had been omitted from the list for that year. But supposing that it had been properly listed and assessed, they furnished their agent, Saunders, with the means to pay the tax for the year 1877, which, however, he failed to apply in that way.

The defendant, Royster, as tax-collector for the city, has demanded the tax for that year, and upon its being refused, threatens to sell the lot for that tax, and has made advertisement thereof. The defendant also put in evidence a private law ratified the 14th day of March, 1879 (Private Acts 1879, ch. 110), whereby the city tax-collector was authorized and empowered to collect all taxes and arrears due the city, for the years 1875, 1876 and 1877.

A temporary injunction had been granted restraining the defendant from selling the property, but upon the coming in of the answer, the same was dissolved by the judge, and the plaintiffs appealed.

Messrs. Hinsdale & Devereux, for plaintiffs.
Messrs. Reade, Busbee & Busbee, for defendants.

RUFFIN, J. The authorities go very far in support of the plaintiffs' right to have their land exempted from the tax complained of. In *N. C. R. R. Co.* v. *Com'rs of Alamance*, 77 N. C., 4, it is said to be clear, under the laws of this state, that lands can be listed for taxation by the owner, or for double tax by the county commissioners in case of his failure, *only in the year, and for the year, in which the tax thereon is due*, and that it can neither be listed nor taxed for any year preceding a current year; and it is expressly declared, that if by any means any real estate, which would otherwise be liable to taxation, should escape being thus listed during the year for which the tax is due, then no tax whatever is collectable thereon. In support of its decision, the court refer to then recent case of *Sudderth* v. *Brittain*, 76 N. C., 458, and the provisions of the statute, Bat. Rev., ch. 202, §§ 12

and 19; and to these we may add *Taylor* v. *Allen*, 67 N. C., 346.

His Honor seems to have taken the same general view of the law, and to place his order dissolving the injunction solely upon the ground, that the agents of the plaintiffs had authorized the land to be listed for the year in question; which act of their agent he finds the plaintiffs, though not fully informed of all the facts in the case, afterwards ratified, in so far as to send the money for the payment of the tax.

The authority quoted appears to go the full length of saying that the owners themselves could not, even with their own direct assent, subject their land to be taxed under the existing circumstances; and if not, then certainly they could not do so through their agent. But supposing it to be otherwise, and that his assent when ratified by them could have the effect supposed, still, the very fact which His Honor finds to be true, that they were not fully informed of the circumstances under which their agent gave his assent, would of itself deprive their subsequent ratification of all its force and virtue. There is no pretence that the agent had positive authority to act for them in the premises; and no doctrine is better established than that the ratification of any act of an agent, previously authorized, must, in order to be effectual and binding on the principal, be made with a full knowledge of every material fact; and, if the facts be either suppressed or unknown, then the ratification is treated as a nullity, because obtained through fraud or mistake. Story on Agency, § 243; *Owings* v. *Hall*, 9 Peters, 607.

Nor can we perceive that the act of 1879, referred to by the defendants' counsel—and which in fact is made a part of the case—can at all affect the rights of the parties. The only authority given by it is *to collect taxes and arrears due the city*, for the three years preceding its passage, and in *N. C. R. R. Co.* v. *Commissioners of Alamance*, *supra*, the doctrine is laid down, without any qualification, that when property has not been assessed for taxation, that is, given in by the owner and its value ascertained under the law, *no taxes are due or recoverable* thereon;

and again in a case between the same parties, reported in 82 N. C., 259, it is still more emphatically said, that a tax, as a debt, does not become due until the taxable property is *listed and valued*, and a definite per centum affixed to its valuation; and that until this be done, no action can be maintained for the tax, or its collection enforced by distress.

For these reasons, the court thinks the order of His Honor dissolving the injunction is erroneous, and that the same should be reversed, and the injunction made perpetual.

It can hardly be necessary, and yet to avoid misapprehension, we note the distinction between the case last cited and the present one. There, the legislature, by a positive enactment, had directed the tax-lists of the county of Alamance to be corrected, and the omitted property to be entered upon them, and the question before the court was as to the effect of the lists when corrected; and not, as here, whether a tax could be levied upon property that had never been listed or assessed for taxation.

Error. Reversed.

F. C. GEER v. H. A. REAMS and another.

Section 133—*Modification of Judgment—Neglect of Counsel.*

1. A judgment may be set aside, in whole or in part: the court is invested by the statute with full legal discretion over the matter.
2. A party defendant, whose attorney enters an appearance as counsel but fails to file an answer, is entitled to relief against a judgment taken for want of an answer—no laches being imputed to the party himself.

(*Bank* v. *Foote*, 77 N. C., 131; *Nicholson* v. *Cox*, 83 N. C., 48, cited and approved).

MOTION to set aside a judgment heard at Fall Term, 1882, of ORANGE Superior Court, before *Shipp, J.*

The plaintiff, as assignee of the Citizens National Bank of Raleigh, brought an action to fall term, 1881, of the superior court of Orange county, upon the following promissory note:

"$2,500. Four months after date, for value received, being for money borrowed, we promise to pay the Citizens National Bank of Raleigh, North Carolina, or order, twenty-five hundred dollars, negotiable and payable at said bank with interest at the rate of eight per cent. per annum after maturity, until paid.

(Signed) JOHN C. BLAKE,
H. A. REAMS,
P. J. MANGUM,
S. R. CARRINGTON,
R. T. HOWERTON.

Judgment was entered at said term against the defendants, Blake and Reams, for want of an answer. Notice was duly served on the plaintiff by the defendant, Blake, that he would move the court to set aside the judgment (under section 133 of the Code) upon the ground that it was irregularly and improvidently granted, and also, of excusable negligence.

In his affidavit in support of the motion, the defendant alleged that shortly after the summons was served upon him, he employed T. C. Fuller, who practiced in said court, to appear for him in the action and make a defence; that Mr. Fuller simply entered an appearance, as counsel, but by inadvertence failed to put in an answer for him, and judgment was taken against him for want of an answer; that he was present at the last term of the court to attend to the case, but found that judgment had been rendered, and he is advised he had a good defence to the action; that the note was made in favor of H. A. Reams for about $2,500—he indorsed the note and discounted the same, and had it re-discounted at the Citizens National Bank, which required him to indorse it; that said sureties were previously liable for the debt and he was not co-surety, and afterwards he learned the said sureties paid the note and had it assigned to the plaintiff for

the benefit of the sureties, and the action was brought, as affiant believes, to compel him to contribute as co-surety.

There was a counter-affidavit filed on the part of the plaintiff, and the motion coming on to be heard, His Honor found the following facts:

That H. A. Reams was the principal on the note sued on, and that John C. Blake, S. R. Covington, P. J. Mangum and R. T. Howerton were co-sureties, and thereupon the court refused to set aside the judgment *in toto*, but modified the same, and adjudged that the judgment rendered at fall term, 1881, stand as to H. A. Reams, and that it be amended as to John C. Blake, so that he shall be liable for the one-fourth part of said note, to-wit: six hundred and twenty-five dollars, with interest, and the costs of the action. The defendant, Blake, appealed.

Mr. J. W. Graham, for plaintiff.
Mr. W. W. Fuller, for defendant.

ASHE, J. Whether the defendant had a meritorious defence to the action, it seems, turned upon the point whether he was co-surety with the other sureties to the note; and the fact was found by His Honor that he was a co-surety, from which we conclude that His Honor was of the opinion the defendant did not have a meritorious defence; but as the affidavit of the defendant did set forth facts making out a case of excusable negligence under section 133 of the Code, His Honor, in the exercise of his legal discretion, set aside the judgment in part. The defendant, however, insists, in that there was error: That if it was a case for the relief sought, it should have been set aside *in toto*. But we do not concur in that position. The court was invested with a full legal discretion over the matter by section 133, and had the right to annul or modify the judgment.

In the case of the *Bank of Statesville* v. *Foote*, 77 N. C., 131, which was a case similar to this, and the defence which the defendant sought to set up was usury, the court below held that

that was not a meritorious defence, yet reformed the judgment by striking from it all the interest which was alleged to be usurious, and the action of the court was sustained by this court. To the same effect is *Nicholson* v. *Cox*, 83 N. C., 48.

Upon the facts of the case as found by His Honor, and the authorities cited, we cannot say there was any abuse of the legal discretion of the court below, and the judgment must be affirmed.

No error. Affirmed.

DAVID MAUNEY v. J. W. GIDNEY and others.

Vacation of Judgment—Section 133—*Infants.*

1. A party seeking to have a judgment set aside on the ground of excusable neglect, must at least set forth in his application such a case as *prima facie* amounts to a valid defence: whether the defence is valid, is a question to be determined by the court, not by the party.
2. There is a presumption in favor of the validity of every judgment of a court of competent jurisdiction, and the burden of overcoming it rests upon the party seeking to set aside the judgment.
3. In applications for relief under section 133, no distinction is made between adult and infant parties, provided the latter are represented according to the requirements of the law and the practice of the court.

(*English* v. *English*, 87 N. C., 497; *Jarman* v. *Saunders*, 64 N. C., 367, cited and approved).

MOTION to set aside a judgment, under section 133 of the Code, heard at January Special Term, 1881, of CLEAVELAND Superior Court, before *Eure, J.*

At August term, 1863, of the county court of Cleaveland county, license was granted to William McSwain, as administrator of George McSwain, to sell the lands of his intestate for assets to pay debts. At the sale, which was had soon thereafter, H.

K. McSwain became the purchaser, and upon report thereof the sale to him was confirmed. He took no deed from the administrator, though it is alleged that he paid him the whole purchase money. Afterwards he sold the land and gave a bond for title, and it has since changed hands several times, so that the right to it is in the plaintiff.

The administrator died in 1871, and in 1876 the defendant, Gidney, qualified as the administrator *de bonis non* on the estate of the first intestate.

In 1878, the plaintiff commenced an action in the superior court against the said defendant, as such administrator, and the heirs-at-law of his intestate, in which he alleged the foregoing facts in connection with the sale of the land and its ownership by himself, and the payment of the purchase money to the first administrator, and asked that the title might be decreed to be made to him by the administrator *de bonis non.*

Two of the heirs were infants, without guardian, and by order the court, J. L. Webb was appointed their guardian *ad litem.* After accepting service of process, the said Webb, as guardian, filed an answer admitting all the allegations of the complaint. The defendant, Gidney, as administrator, also filed an answer, in which he denied that the purchase money had ever been paid.

At fall term, 1878, a judgment was rendered in the cuase, declaring that the purchase money had been paid, and directing the deed to be made, as asked for by the plaintiff.

Afterwards a motion was made to set aside such judgment, upon the ground of excusable negligence or surprise, which was heard at special term in January, 1881, when the judge below, after setting out so much of the case as is above stated, made additional findings of fact as follows:

That the process in the original cause was served on all the parties, infants and adults; the plaintiff made an affidavit before the clerk on the 11th of October, 1878, setting forth that the two defendants (W. P. and D. J. McLean) were infants, without guardian, and asking that a guardian *ad litem* might be appinoted

for them, and on the same day the order appointing Webb as such was made; a summons immediately issued for him, and the service thereof accepted by him; that he was appointed guardian *ad litem* at the request of plaintiff's counsel, and filed his answer admitting the allegations of the complaint upon the assurance of such counsel that all the proceedings in the original action were regular and according to law, and relying upon such assurances, he made no investigation of the rights of his wards, or sought information from any other quarter; the administrator, Gidney, received similar assurances from plaintiff's counsel, as to the regularity of the original proceedings, which prevented his making such inquiries into the facts as otherwise he would have done; that the other defendant (Martha E. McSwain) was of full age, but ignorant and without experience, and had no proper understanding as to the nature of the proceedings, and, upon seeking advice from a neighbor, was told that he had consulted counsel for her, who informed him that it was useless to attempt to make any defence, and that the plaintiff's counsel, in giving the assurance to the guardian and administrator, acted strictly in good faith and with no purpose to deceive or mislead them, but that the guardian at the time of his appointment was a young man just licensed as an attorney, and without a correct understanding of his real duty in the case; that the administrator, Gidney, is also a lawyer, but for the reason stated, gave no more attention to the matter; and since that time, both the guardian and administrator have looked fully into the matter, and learned to their satisfaction that the heirs had a valid defence to the action, and that no such judgment ought to have been rendered in the cause. The deed, which the administrator was directed to make to the plaintiff for the lands, was made soon after the judgment was rendered and before any notice was given of the motion to vacate it. Upon the foregoing facts His Honor directed the judgment to be set aside, and from that ruling the plaintiff appealed.

Messrs. D. Schenck, R. McBrayer and *D. G. Fowle*, for plaintiff.

Messrs. Haywood & Haywood, for defendants.

RUFFIN, J. We infer, though it is barely a matter of inference with us, that some irregularity was committed in the course of the proceedings in the county court when the first administrator applied for a license to sell the lands of his intestate, which it is now supposed vitiated those proceedings and may affect injuriously the order that was then made. Nothing of the sort, however, is alleged to have occurred in the action which the present plaintiff brought in 1878, for the purpose of enforcing the execution of his deed. So far as is disclosed in the record or in the findings of the court below, that action was regularly conducted, all the parties being duly served with process and before the court, and the judgment itself rendered strictly according to the course of the court. To rid themselves, therefore, of this judgment, the defendants must rely, as they seem to do, solely upon the ground of "excusable neglect" as provided for in the statute. C. C. P., § 133. Confining our attention to this view of the case, we are unable to see anything in the facts found, calling for, or even justifying an exercise of a legal discretion on the part of the court to deprive the plaintiff of the benefit of a judgment thus obtained, and put the cause again at issue.

In the first place, and contrary to all the authorities, the defendants omit to set out in their application any defence whatsoever which they then had, or which it is conceived they could now make to the action; and for aught the court can tell, looking to their allegations, it may be called upon after setting aside the judgment to render just such another between the same parties. To avoid engaging in so vain a thing, the courts have uniformly required in all such applications that the parties should, at least, set forth such a case as *prima facie* amounted to a valid defence. *English* v. *English*, 87 N. C., 497; *Jarman* v. *Saun-*

ders, 64 N. C., 367. Nor is this failure on their part at all cured by the judge's finding, as a fact, that the defendant administrator and the guardian *ad litem* have since satisfied themselves that there really existed a defence, which, had it been relied upon, would have defeated the action. The particulars of that defence are not so stated, as that the court can take hold of it and determine its merit, and it is for the court to do this and not the parties.

In the next place, there is always a presumption—and it is proper that there should be—in favor of the validity and integrity of every judgment of a court of competent jurisdiction, the burden of overcoming which, even in cases coming within the statute, rests upon a party who seeks to have the judgment vacated. He must show that his default in making his defence proceeded from what the law deems *excusable neglect*, and until he does so the judgment must stand. In this regard, too, no distinction can be made between infant and adult defendants. If properly before the court and represented according to the requirements of the law and the practice of the court, the former must be as much bound as the latter by the judgment, and as much affected by the presumption in its favor.

So far from answering to this requirement of the law, the default of these defendants, or those whose duty it was to represent them, was the very reverse of excusable, in that, they omitted to do the very thing which they were appointed to do, that is, to inform themselves of the real merits of the case, and to ascertain and put forth the defences proper to be made.

The assurance which they received from the plaintiff's attorney, that he had an incontestible cause of action, ought not to have misled them, and could not have done so, if they had been even ordinarily prudent and diligent.

What discreet man, when sued, would think of going to his adversary's counsel for information as to the defences and the proper mode of asserting them? For negligence, such as this, the statute makes no provision; neither can the law palliate it

without being untrue to itself, and to all its teachings of diligence.

Unquestionably, if the counsel had made use of any artifice for the purpose of misleading them and preventing their ascertaining the true facts of the case, the court would have been prompt in relieving them from its consequences. But not so, when all he did was to give his honest opinion when asked, and when the only wrong done consists in their having followed his advice.

As to the adult defendant, there is absolutely no ground for disturbing the judgment as to her. She took the advice of counsel, and, having acted on it, must abide the result.

The court is therefore of the opinion that it was error in the court below to set aside the judgment rendered in the cause, and the order to that effect is reversed.

Error. Reversed.

W. L. CHURCHILL v. BROOKLYN LIFE INSURANCE COMPANY.

Vacation of Judgment—Section 133—Power of Court over its judgment.

1. A party is guilty of inexcusable neglect, and is not entitled to relief against a judgment rendered against him, where it appears that a summons was regularly served, and he paid no attention to the case either in person or by attorney, even although he supposed he was not required by the law to answer the complaint until served with a copy.
2. The court has the power to modify a final judgment, and make it one by default and inquiry.

(*Dick* v. *McLaurin*, 63 N. C., 185; *Dick* v. *Dickson*, *Ib.*, 488; *Kerchner* v. *Baker*, 82 N. C., 169; *English* v. *English*, 87 N. C., 497; *Henry* v. *Clayton*, and cases cited, 85 N. C., 371, approved).

MOTION to set aside a judgment heard at Fall Term, 1882, of GREENE Superior Court, before *MacRae, J.*

An action was brought by the plaintiff against the defendant company, a corporation duly organized under the laws of the state of New York, and the summons, returnable to fall term, 1882, was regularly served on June 28, 1882, upon W. W. Smith, the company's general agent in this state, and the person upon whom service of process may be made under the act of 1877, ch. 157, § 3.

At fall term, on the first Monday in October, 1882, the plaintiff filed his complaint, in which he alleged that on April 29, 1871, he obtained a life policy from the defendant for fifteen hundred dollars, and was to pay therefor, by the stipulations of said policy, a semi-annual premium of $15.96 during the lifetime of the plaintiff; that he has regularly made such semi-annual payments until the 29th day of April, 1882, inclusive, making in all twenty-two payments, and amounting to the sum of $350.12, and that the same were made to said general agent; that about the 28th of April, 1882, he paid to said agent the semi-annual premium due on the day following, who acknowledged its receipt, but wrote that he did not have the renewal receipt of the plaintiff, but had written to the company for it, and would forward it as soon as received; that on the 5th of May, 1882, said agent wrote to the plaintiff informing him that the company had written to him (Smith) that it had notified the plaintiff to pay his premium at the "Home Office" in New York, and had returned to him (Smith) the sum of $15.96, the amount of premium due on the 29th of April, saying that the said agent was not authorized to receive it. The plaintiff further alleged that no such notification from the company was received by him prior to said 29th of April, that the premium must be paid at the Home Office; but as soon as the notification came to him, to-wit, on the 15th of May, 1882, he remitted to the company, at the Home Office, the premium due on the said 29th of April, and the defendant, declining to accept the same,

returned the amount to the plaintiff and refused to renew the policy, until the company had specific and satisfactory information of the habits of the plaintiff. Whereupon the plaintiff demands judgment for the amount of the premiums which he had paid.

The defendant failed to answer the complaint at said fall term, and judgment by default was rendered in favor of the plaintiff. Between that and the next term, the defendant moved to set aside the judgment on the ground of excusable neglect under section 133 of the Code, and the excuse given was, that immediately after the service of summons on Smith, the general agent, the defendant wrote to him that as soon as he received the complaint to send it to the defendant and further instructions would then be given—supposing that, as in New York, a copy of the complaint would have to be served, before the defendant would be required to answer, and no such copy having been served, it concluded that no judgment could be taken.

His Honor, being of the opinion that the negligence was inexcusable, refused to allow the motion; but considering the final judgment to be irregular, he modified it so as to make it a judgment by default and inquiry, and the defendant appealed.

Mr. W. C. Munroe, for plaintiff.
Messrs. Strong & Smedes and *Walter Clark,* for defendant.

ASHE, J., after stating the case. This the court had the power to do. *Dick* v. *McLaurin,* 63 N. C., 185; *Dick* v. *Dickson, Ib.,* 488.

But then the question is raised whether the court erred in refusing to set aside the judgment altogether, upon the ground of excusable negligence.

A party seeking to vacate a judgment under section 133 of the Code, is always at default, and the *onus* is upon him to show facts which would make the refusal to vacate appear to be an abuse of discretion. *Kerchner* v. *Baker,* 82 N. C., 169. Here,

the summons was served upon the defendant's agent on the 28th of June, 1882, and at the return term, more than three months after the service, the defendant allowed judgment to be taken against it, relying upon what it supposed was the law in regard to the action, instead of directing the agent here to employ an attorney and get advice as to what was necessary to be done in the case. This is what every man, with ordinary diligence in his business matters, would have done under the circumstances. The defendant and its agent knew that the summons was returnable to the fall term of the court, more than three months after legal notice of the action, and no counsel was consulted in the *interim*, and neither of them attended the court, or paid any attention to the case. The neglect was inexcusable. It was the neglect of the party, and is distinguishable from those cases where the neglect is imputable to the attorney—as in *English* v. *English*, 87 N. C., 497, and cases there cited. The case falls within the principle decided in *Henry* v. *Clayton*, 85 N. C., 371; *Bradford* v. *Coit*, 77 N. C., 72; *Studer* v. *Rollins*, 76 N. C., 271; *Waddell* v. *Wood*, 64 N. C., 624.

No error. Affirmed.

TREDWELL, Mallory & King v. A. W. GRAHAM and others.

Evidence—Section 343—*Deed—Fraud, evidence in.*

1. A party's declarations and admissions pertinent to the issue are evidence against him, and if made in the presence and at the instance of others having a like interest with him, they are evidence against them.

2. Notwithstanding the statute, section 343 of the Code, one may testify to a transaction by the opposite party, when against his own interest. And though direct evidence of a conversation with a person deceased be incompetent, a rehearsal of the same in a conversation with a son of the

deceased is competent under the facts of this case, as part of the *res gestæ*.

3. A deed made by an insolvent father to his son, in the presence of another son, nothing else appearing, is presumed to be fraudulent as to creditors. The burden to remove this presumption rests upon him who seeks to uphold the conveyance. A grantee in such case may protect his title by showing that he is a purchaser for value and without notice of the grantor's fraudulent intent.

(*Weinstein* v. *Patrick* 75 N. C., 344; *Gilmer* v. *McNairy*, 69 N. C., 335; *Satterwhite* v. *Hicks*, Busb., 105; *Reiger* v. *Davis*, 67 N. C., 185; *Hawkins* v. *Alston*, 4 Ired. Eq., 137; *Claywell* v. *McGinsey*, 4 Dev., 89; *Griffin* v. *Tripp*, 8 Jones, 64; *Cansler* v. *Cobb*, 77 N. C., 30, cited and approved).

CIVIL ACTION tried at Spring Term, 1883, of DURHAM Superior Court, before *Gilmer, J.*

Verdict and judgment for defendants; appeal by plaintiffs.

Mr. W. W. Fuller, for plaintiffs.
Mr. J. W. Graham, for defendants.

RUFFIN, J. This action is brought for the recovery of the possession of land.

The plaintiffs, Tredwell, Mallory & King, are partners, and claim title under two deeds—the one from Rufus Bobbitt to his son William A., dated October 14th, 1879, and the other from the said William A. to themselves, dated July 31st, 1880.

The defendant, Graham, claims by virtue of a purchase at execution sale made in March, 1880, under judgments obtained against the said Rufus Bobbitt in Granville county, and docketed in Orange county on the 8th day of November, 1879.

The execution of the several deeds introduced was not denied, but the case was made to turn upon the *bona fides* of the deed from Rufus Bobbitt to his said son, there being evidence offered going to show his insolvency at the time of its execution.

The only issues submitted were: 1. Was the deed of Rufus Bobbitt to W. A. Bobbitt fraudulent? which was responded to by the jury in the affirmative. 2. Did the plaintiffs have notice

of such fraud before taking their deed from W. A. Bobbitt? which was answered in the negative.

The case is brought to this court upon the following exceptions taken for the plaintiffs:

1. The deposition of W. S. Mallory, who is a member of the firm, and a plaintiff in the action, had been taken at the instance of the plaintiffs, and in response to a question propounded by them, the defendants not being present either in person or by an attorney, he had stated that his firm had a considerable claim upon Rufus Bobbitt and his son William A., and learning that they were largely involved, he was sent, in the summer of 1880, to see them in regard to it; that he found the father at home, who informed him of his inability to pay this and his other debts, but expressed a wish, growing out of the kindness hitherto shown him by the plaintiffs, to secure them in any way that he could; that his property, meaning that in dispute, stood in the name of his son William A., who was then in Virginia, but that he would give the witness a letter to take to him, instructing him to give the plaintiffs a deed for the land; that thereupon, at the request of the said Rufus, the witness wrote a deed purporting to convey the land from the son William A. to the plaintiffs, using as a form the deed which the said Rufus then had in his possession, dated the 14th October, 1879, and by which the land was attempted to be conveyed to his said son; that the witness then took the deed so prepared, together with a letter from the father, to Virginia, where the same was executed by the son. Other matters were referred to in the deposition, and in reading it to the jury the plaintiffs read only such portions as related to the same, and omitted that part which had reference to the interview between the witness and the elder Bobbitt. The defendant then offered to read that part of the deposition, and was permitted to do so, though objection was made by the plaintiffs and though it was shown that Rufus Bobbitt had died before it had been taken, and to this the plaintiffs excepted.

The court can perceive no ground upon which this exception

can be sustained. Conceding that it was proper for the plaintiffs to omit reading this portion of the deposition, and regarding only the question as to the competency of the testimony as offered by the defendant, it does not seem possible to doubt the correctness of His Honor's ruling with regard to it. A party's own declarations and admissions, if pertinent, are always evidence against him, without regard to their subject matter, and if made in the presence and at the instance of others having a like interest with himself, they are likewise evidence against them; and the fact that they were put in the form of sworn answers to interrogatories can neither lessen their weight nor affect the question of their admissibility. Nor does the case come under section 343 of the Code, so as to be excluded as being a transaction with a deceased person. As is said in *Weinstein* v. *Patrick*, 75 N. C., 344, notwithstanding that statute, a party may be called to testify touching such a transaction by the opposite party and when against his own interest, and if this be so, then his declarations under similar circumstances may be used against him. Why should it not be so? since in such a case it is impossible that the mischief can occur, which it is the policy of the statute to avoid. The plaintiffs, speaking through their partner (Mallory), may well be trusted to testify as to a transaction with their deceased assignor, as they stand in his shoes; and their interests, derived from him, the law deems, independently of any statutory restraints, to be a sufficient guaranty of their truth.

2. The defendant introduced the plaintiff, W. A. Bobbitt, as a witness, and he was allowed to testify, and did testify, though objection was made by the plaintiffs, that when the plaintiff (Mallory) came to Virginia in 1880, he told the witness that Rufus Bobbitt (the father) said that the land in controversy had been sold by the sheriff and purchased by the defendant, and that the mortgage which the plaintiffs then held was not secure; that the land had better be secured by a deed, and that he (Mallory) did not regard his mortgage as secure, but thought a direct

conveyance would be safer. This exception is the same in substance with the first, and seems to be fully answered by what is said with regard to it. It falls, too, directly within the principle declared in *Gilmer* v. *McNairy*, 69 N. C., 335. It was there held, that though direct evidence of a conversation or understanding with a party deceased might be incompetent under the statute, a rehearsal of the same in a conversation with an agent of the deceased was competent, as constituting a part of the *res gestæ*.

3. The same witness (Bobbitt) had shown to him the deed from his father to himself, purporting to convey the land in controversy, and, upon being asked whether he had ever seen it before, testified that he never had, and that all he had ever heard of it came from the plaintiff (Mallory) during their interview in Virginia. He was also asked, in whose handwriting the deed was, and whether it had been written in his presence and at his request and knowledge, and in reply, testified that the handwriting was that of his brother, one R. H. Bobbitt, who was also the subscribing witness, and that the same had been written without his knowledge or directions. Conceding that the execution of the deed was a *transaction* between the witness and his deceased father, and that the evidence so far as it tended to disprove this fact was inadmissible, still the court cannot see that any such prejudice resulted to the plaintiffs from its reception, as to require the verdict to be set aside on account thereof. The case states expressly that the execution of the deed was admitted upon the trial, and furthermore, the only issues submitted, or which were asked to be submitted, had reference solely to the intent with which it had been *executed*, and the knowledge which the other plaintiffs had of that intent, in case it were found by the jury to have been fraudulent. The answer of the defendants, their admissions at the trial, the very frame of the issues, and the verdict itself, all concur in recognizing the execution of this instrument as an admitted fact, and this admission necessarily carries with it a concession as to the sufficiency of its

delivery. The most, therefore, that could be said against the evidence complained of is, that it was irrelevant and wholly immaterial, but, so far as can be seen, harmless; and the same remark applies to the instruction asked for by the plaintiffs, and which was given as asked upon the point as to its delivery.

4. The plaintiffs requested the court to instruct the jury that in order to vitiate and render void the transaction, the grantee must be a party to the corrupt intent of the maker of the deed, or have some knowledge of such intent at the time of its execution, and that the deed being *prima facie* good for all purposes, it devolved upon the defendants to remove the presumption in its favor. His Honor, without referring to the special instructions asked, told the jury that the burden of proving the fraud was upon the defendants, but when it appeared that a deed had been made by an insolvent father to a son in the presence of another son, and nothing else appearing, the transaction was viewed with suspicion, and in law was presumed to be fraudulent as to creditors; and in such case the burden was shifted, and it rested with the plaintiffs to overcome that presumption of the law, and it was for the jury to say whether they had done so.

The instructions given seem to be fully warranted by the authorities and the circumstances of the case. In *Satterwhite* v. *Hicks*, Busb., 105, and in *Reiger* v. *Davis*, 67 N. C., 185, it is said to be a rule of law to be laid down by the court, that when a debtor, much embarrassed, conveys his property to a near relative, and the transaction is a secret one, conducted only in the presence of near relatives, it is to be regarded as fraudulent; and this seems to be but a fair deduction from what is said in *Hawkins* v. *Alston*, 4 Ired. Eq., 137, which has so often been cited by the courts; and especially must this be true in a case like the present, in which not only the father but the son also was insolvent, and there was not the least effort made to show that the consideration recited in the deed was ever in fact paid, or was intended to be paid. The deed itself, though evidence conclusive as to all matters between the parties, furnishes no evidence of the truth

of the matters contained in its recitals, as against strangers: for as to them, it is strictly *res inter alios acta*. *Claywell* v. *McGinsey*, 4 Dev., 89; *Griffin* v. *Tripp*, 8 Jones, 64. If voluntary, the law pronounces it fraudulent as to creditors, and he who took it must have had notice of that fact. As said by PEARSON, C. J., in *Cansler* v. *Cobb*, 77 N. C., 30, when a grantor executes a deed with intent to defraud his creditors, the grantee can only protect his title by showing that he is a purchaser for a valuable consideration, and without notice of the fraudulent intent on the part of his grantor. Bat. Rev., ch. 50, § 4.

The conclusion of this court, therefore, is that there is no error in the judgment of the court below, and the same is affirmed.

No error. Affirmed.

J. N. STALLINGS, Adm'r, v. WILLIAM LANE and others.

Evidence of Agricultural Agreement—Surety and Principal—Additional Security does not release surety, when.

1. Evidence of the relations of parties farming together and the contributions of each in the cultivation of crops, and that the portion of one was credited on his note to a third party, warranted the jury in the absence of direct proof in finding that the crops were to be divided between them. And, after making such agricultural agreement, the deed of assignment of one of them, mentioned in the case, conveys only his interest in the crops.

2. Where additional security is given by the principal debtor, with no understanding for further time, and the remedy to enforce collection remains as before; *Held*, that the surety is not thereby discharged: such security enures to the advantage of the surety.

(*Deal* v. *Cochran*, and cases cited, 66 N. C., 269; *Carter* v. *Duncan*, and cases cited, 84 N. C., 676; *Bank* v. *Lineberger*, 83 N. C., 454; *Harshaw* v. *McKesson*, 65 N. C., 688, cited and approved).

STALLINGS *v.* LANE.

CIVIL ACTION tried at July Special Term, 1882, of DUPLIN Superior Court, before *Gilliam J.*

Defendant appealed.

No counsel for plaintiff.

Mr. H. R. Kornegay, for defendants.

SMITH, C. J. On January 2d, 1868, the defendant rented from J. N. Stallings and Joel Loftin (to whom joint letters of administration on the estate of Nancy Sollis were issued) a tract of arable land of the intestate for that year, and at the same time executed his note under seal with the other defendants as sureties, payable to them in their representative capacity at six months, for articles of personal property bought at the administration sale, in the sum of $245.96. The value of the note was aftewards reduced by three successive partial payments to the administrator, Loftin, indorsed thereon, as follows: One on June 3d, 1868, $19.41; on January 29th, 1869, $111.33, and on April 15th, 1870, $97.62.

On August 17th, 1868, the debtor, Lane, executed a deed of mortgage to the said administrators, reciting his indebtedness on said note and on another for $95.55, due on January 1st, 1869, with the same sureties, conveying "his right, title and interest in the crop raised upon the land rented" as aforesaid, and "a cart," to secure and provide for the payment of the said notes, with a concluding clause in these words: "And the said party of the first part (Lane) agrees to hold the same for the payment of the said notes as agent of said parties of the second part," the mortgagees.

Upon the trial of the issues it was in proof that one Bason, whose daughter Lane had married, occupied and cultivated the farm together during the year 1868, the former furnishing two mules, his own and his childrens' labor; and the latter (Lane) his own personal services in making the crop.

Evidence was also introduced tending to show that Loftin,

since deceased, received part of the crop of cotton raised on the premises in 1869, which he sold and applied the proceeds as an indorsed credit upon the bonds; that Lane's share of the corn crop of 1868 passed into Loftin's possession and was by him advanced to Lane to make the crop of 1869, under an arrangement that it was to be paid therefrom.

There was no direct proof of the terms on which Lane and Bason farmed during the year, but the value of the entire crop was sufficient to discharge the secured debts.

The defendant contended that the taking the assignment from Lane of his interest in the crop, then growing and thereafter to be gathered, involved an implied contract to extend the time of payment beyond that fixed in the note, and discharged the sureties from further liability for the debt; and he asked these directions to be given to the jury:

1. The entire crop grown on the land in 1868 passed under the defendant's mortgage to the administrators, and as it ought to have been received and applied by them to the debts, and if so applied would have paid them in full, the omission of the mortgagees to do so and its consequent loss operate as an exoneration of the sureties.

2. There is no evidence that Bason had any vested interest in the crop, or was entitled to any share th ereof

The instructions were refused, and the court charged:

1. That there was evidence, though not direct and positive, tending to show that the farm was cultivated in 1868 on shares, taken in connection with a declaration of Loftin, called out by the defendant, "that he (Loftin) had received Lane's part of the crop of cotton and credited it on his note," and it was for the jury to ascertain what shares each was to have in the product of the farm.

2. If the crop of 1868 was raised by the joint labor of the parties under the agreement entered into before the making of the assignment by which they became croppers, then the deed of Lane only conveyed his share and interest therein.

The court further held that the acceptance of the mortgage as a further security for the debts and upon the terms therein contained, did not imply a contract to defer payment, and did not, in law, relieve the sureties from their obligation.

The correctness of these rulings are before us on the appeal.

The exceptions to the refusal of the court to give the directions asked, and to the directions given, we think have no support in the evidence heard. There was evidence of the relations of the parties who farmed together, and the contributions of each towards the tillage of the land and making the crop, from which, in the light of the declaration brought out, the jury were fully warranted in arriving at the conclusion that the crop was to be divided and perhaps in equal proportions.

Nor is the construction, put upon the description of the property contained in the mortgage, obnoxious to just criticism. "The *right, title and interest in the crop raised*" must be that which the mortgagor himself had and could assign, not that of his associate cropper, which he could not transfer by his own act.

He does not undertake to pass the crop as if it was all his, but only his *interest;* that is, his share thereof.

We concur also in the opinion of the court as to the character and effect of the mortgage, and its acceptance by the administrators upon their relations toward the sureties.

"It is a well settled principle of equity as between creditor and surety," observes PEARSON, C. J., "that where the creditor by a binding contract, and not as a mere *nudum pactum*, gives further time to the principal debtor, the surety is discharged by matter *in pais*, as it is termed in the books." *Howerton* v. *Sprague*, 64 N. C., 451.

"It must be," in the language of READE, J., "a valid contract with the principal debtor without the assent of the surety, by which the rights or liabilities of the surety are injuriously affected, to exonerate the latter. *Deal* v. *Cochran*, 66 N. C., 269.

Even a usurious contract, at least where the consideration is executed, though avoidable by the creditor, will have the like

effect. *Pippin* v. *Bond*, 5 Ired. Eq., 91; *Scott* v. *Harris*, 76 N. C., 205; *Carter* v. *Duncan*, 84 N. C., 676; *Bank* v. *Lineberger*, 83 N. C., 454. See 2 Am. Lead. Cas., *United States* v. *Howell*, 136, and notes.

Our attention has been called to the decision in *Harshaw* v. *McKesson*, 65 N. C., 688, as maintaining the proposition that the taking a further security for the debt in the assignment of a growing and immature crop, by implication involves an agreement to wait until it is fit to be gathered and removed, and that this extension of the time of payment releases the sureties.

That case, however, does not warrant the deduction of any such broad and comprehensive proposition, as a brief examination will show.

The plaintiff's testator holding several single bonds against the defendants, through an agent, not being present himself, procured from McKesson, the principal debtor, the execution of a mortgage of lands lying in several counties, in which was a provision that the deed should be void if the debtor, "according to an agreement now made," shall pay the secured debts—"the one-third part thereof in three years; one-third part in four years; and the remainder in five years from this date." When the conveyance was made, and as part of the transaction, the agent assuming to act for and in the name of his principal, executed a covenant whereby indulgence was to be given for the payments as set out in the mortgage. The action was brought upon one of the secured debts due upon its face, but before the expiration of the time limited in the mortgage and in the covenant. The court held that while the covenant was inoperative for want of authority in the agent to make it, nevertheless, *the obligation* in the bond had been modified by the obligor in the accepted mortgage, and the executors could not sue until the time specified therein had expired. The ruling is put upon the ground that a new security is taken for one pre-existing, giving further time

for payment; and this implies an agreement to forbear suing upon the first.

The assignment in the present case bears none of the essential features of the mortgage of McKesson, on which that decision is made to rest. It is unconditional and absolute. No defined day for selling is fixed—no time for redemption given—and the secured debt remains in every respect the same as before, capable at once of being put in suit. There is no delay necessary in proceedings for foreclosure, and nothing contained in the provisions of the instrument from which an understanding to indulge can be inferred. The taking the additional security in the property of the principal debtor enures to the advantage of the sureties as well, since it is in favor of their interests, and must first be applied to the debt. How can they complain of this, and of what right are they deprived? To exonerate the sureties because the creditor obtains property of their principal to increase his own security and theirs alike, is to take away from the creditor the right to seek the means of satisfaction out of his effects, while at the same time he is subserving the interest of the sureties.

"Such an agreement to suspend or delay will not be inferred from the mere giving the collateral security with power to sell the same at a certain time, if the debt be not paid." 2 Pars. Cont., 685.

In *Eures* v. *Widdowson*, 4 C. and. P., 151, referred to by Mr. PARSONS, an assignment of property was made to secure sums due and future demands, with a power of sale not to be executed until after six months' notice. An action was brought on two bills of exchange protected in the assignment, which was set up as a defence, and TINDAL, C. J., says: "I am of opinion that such an assignment can only be considered as a collateral security, and that the personal remedy *is not suspended, as there is not any clause to that effect in the deed.*"

If the right to sue is not obstructed by taking an assignment when there is a postponement of sale of the assigned property,

still less can it be when, as in our case, no such provision is found; and, without a valid contract to give time, the sureties cannot claim a discharge.

There is no error, and the judgment must be affirmed.

No error. Affirmed.

DUNCAN McFADGEN and others v. J. T. COUNCIL and others.

Bankruptcy—Creditor's Right.

A creditor proving his claim in bankruptcy does not waive his right of action in the state court against the bankrupt, where a discharge has been refused or the proceedings determined without a discharge. This provision of the bankrupt act affects the remedy only, and applies to existing suits.

MOTION to dismiss the action heard at February Term, 1883, of THE SUPREME COURT.

Messrs. Merrimon & Fuller, for plaintiffs.
Messrs. Hinsdale & Devereux, for defendants.

RUFFIN, J. This cause has been standing for several terms upon exceptions to the report of a referee, but a motion was made at the last term, and argued at this, to dismiss the plaintiffs' suit, upon the ground that the principal defendant, John T. Council, has been adjudicated a bankrupt during its pendency, and the claim which is the subject of controversy has been proved against his estate in the bankrupt court, by the present holder thereof, thus waiving, as it is insisted, all right of action upon it in any other court.

In answer to the motion, the plaintiffs produce and rely upon a certified copy of the record of the bankrupt court, showing that

the said defendant has been refused his discharge by that court, and that the proceedings therein have been determined without his having obtained the same.

This is an old equity suit, conducted upon bill and answer, according to the former system, and the more regular course for the defendants to have proceeded would have been by a petition in the cause, or a supplemental answer, rather than by motion. But waiving all question as to the mode of proceeding, the motion to dismiss must fail upon legal grounds.

As originally drawn, the 21st section of the bankrupt act left some doubt as to the right of creditors to sue upon their claims elsewhere than in the bankrupt court, in case the bankrupt failed to procure his discharge; and there were several conflicting decisions in regard to the point. But with a view to render the law certain, that section was amended by the act of June 22, 1874, ch. 390, § 7, and it was expressly provided that "a creditor proving his claim shall not be held to have waived his right of action or suit against the bankrupt, when a discharge has been refused, or the proceedings have been determined without a discharge." This being a provision that affects the remedy only, it applies to existing suits as well as any other, and it entirely removes all doubt as to the right of the plaintiffs to maintain their action.

The defendants' motion is therefore overruled at their costs; and, understanding the defendants to say that they no longer insist upon their exceptions to the report, the same are overruled, and judgment will be entered here for the plaintiffs according to the report.

Per Curiam. Judgment accordingly.

GEORGE R. COUNCILL v. JOHN HORTON.

Bankruptcy.

No debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer (here, as sheriff) or while acting in a fiduciary capacity, shall be discharged by proceedings in bankruptcy.

(*Simpson* v. *Simpson*, 80 N. C., 332; *Calvert* v. *Peebles*, *Ib.*, 324, cited and approved).

CIVIL ACTION commenced in a justice's court, and tried on appeal at Spring Term, 1882, of WATAUGA Superior Court, before *Avery, J.*

The facts agreed upon are as follows: The defendant was sheriff of Watauga county in 1872, and gave his official bond in the sum of $16,000, conditioned for paying county and school taxes, &c., in the several forms prescribed by law, and the plaintiff was one of his sureties thereto.

The defendant failed to perform the conditions, and an action was brought on the bond by the county commissioners against the defendant, together with the plaintiff and the other sureties, and judgment was rendered in favor of the commissioners at fall term, 1875, for $1,099.

The plaintiff paid upon this judgment the sum of $155, within one year before the 14th of May, 1881, when this action was brought.

The defendant was adjudicated a bankrupt and received his discharge after said judgment was rendered, and before this action was commenced.

The court gave judgment in favor of the plaintiff for $155, interest and costs, and the defendant appealed.

Messrs. D. G. Fowle and *J. F. Morphew*, for plaintiff.

No counsel for defendant.

ASHE, J. The action, in which judgment was obtained against the defendant, as sheriff, and his sureties, was for a breach of his official bond in not paying over to the county the sum due for taxes, either not collected or collected and not paid over by him.

It is declared by section 33 of the bankrupt act, "that no debt created by the fraud or embezzlement of the bankrupt, or by his *defalcation as a public officer*, or while acting in a fiduciary character, shall be discharged under this act."

The debt upon which the judgment against the defendant and his sureties was rendered, was created by the defalcation of the defendant, as sheriff. The debt was then not discharged by the bankruptcy of the defendant. Debts created by the defalcation of a public officer, and those of a fiduciary character, are put by the act in the same class. The same principle that applies to the one will apply to the other; and it has been held by the supreme court of Kentucky that a discharge in bankruptcy does not relieve a guardian from his fiduciary obligations, as such, and if his surety discharges these and obtains a judgment therefor, he may levy upon the property of the bankrupt acquired after his discharge. *Carlin* v. *Carlin*, 8 Bush, 141; approved in *Simpson* v. *Simpson*, 80 N. C., 332, and *Calvert* v. *Peebles*, *Ib.*, 334.

No error. Affirmed.

R. C. WINDLEY, Adm'r, v. MARTHA TANKARD and others.

Bankruptcy—Homestead.

1. The decision in *Blum* v. *Ellis*, 73 N. C., 293, approved in subsequent cases, to the effect that creditors of a bankrupt must enforce their liens in the bankrupt court, is the settled law of this state.
2. The extent in value and duration of a homestead allotment, made in the bankrupt court, is the same as prescribed by the law of the state.

(*Blum* v. *Ellis*, 73 N. C., 293; *Withers* v. *Stinson*, 79 N. C., 341; *Dixon* v. *Dixon*, 81 N. C., 323; *Lamb* v. *Chamness*, 84 N. C., 379; *Hinsdale* v. *Williams*, 75 N. C., 430, cited and approved).

SPECIAL PROCEEDING commenced in the probate court, and heard at Fall Term, 1882, of BEAUFORT Superior Court, before *Gilliam, J.*

Judgment for defendants; appeal by plaintiff.

Mr. Geo. H. Brown, Jr., for plaintiff.
Mr. C. F. Warren, for defendants.

SMITH, C. J. The plaintiff, administrator *de bonis non* of George R. Tankard, institutes this proceeding before the probate judge of Beaufort county against the defendants, his children and heirs-at-law, for an order to sell the tract of land, therin described, for assets to be used in payment of the intestate's debts.

The debts set out in an annexed exhibit were reduced to judgments before a justice of the peace, and docketed in the superior court, the first, on June 10th, 1871, and the second, on May 23d, 1873, and both belong to the plaintiff. One of the defendants is above, and the other two under the age of twenty-one years.

The intestate, under proper proceedings in the district court of the United States, was, on July 10th, 1873, adjudged a bankrupt, and dying some time thereafter, his widow and administratrix, herself since deceased, applied for, and on October 27th, 1874, obtained a decree discharging the intestate and his estate from all debts provable and existing prior to his being declared a bankrupt.

The land embraced in the petition was, on October 23d, 1873, set apart and assigned to the intestate as his homestead exemption, under the act of Congress, by the assignee, who, on the 5th day of February following, subject thereto, as we understand

the case, sold and by deed conveyed the same land to one D. M. Carter, and he thereafter conveyed his estate to the defendants.

These are the facts found by the court with the consent of parties, or admitted by them, and upon which His Honor gave judgment for the defendants, dismissing the action.

The argument on the part of appellant for reversal proceeds upon two grounds:

1. The judgments constituting liens upon the land before the filing of the petition in the bankrupt court, were not displaced by the decree of discharge, nor were the debts, to the extent of the value of the property to which the liens attach, extinguished thereby.

2. The homestead, being an exemption personal to the bankrupt, endured under the bankrupt act only for his life, and expired at his death.

I. The first proposition is in direct conflict with the decision in *Blum* v. *Ellis*, 73 N. C., 293, in which it is held, that all the property of the bankrupt, whether subject to judgment liens or not, passes to the assignee and is *in custodia legis*, and that the creditor must enforce his lien in the bankrupt court, or it will be lost, and his debt discharged. The principle thus declared was reconsidered and affirmed in *Withers* v. *Stinson*, 79 N. C., 341, and again in *Dixon* v. *Dixon*, 81 N. C., 323.

As was said by Justice DILLARD, in the latter case: "After these two decisions of this court, whatever might be our views of the question if it were now for the first time presented, we would hold ourselves bound under their authority"; and we may add that the law must now be regarded as settled until it shall be declared erroneous by the supreme court of the United States, and we cannot entertain an argument calling it in question. The highest considerations impel us to adhere to a series of decisions rendered upon careful deliberation, and not disturb titles based upon them, unless upon cogent and clear convictions of error and judicial duty, and to obviate irremediable mischiefs.

II. The amendments made to the bankrupt act, at the session

of 1872–'73 of Congress, provides, that the exemption, co-extensive with that allowed by the constitution and laws of each state, as existing in the year 1871, shall prevail "against debts contracted before the adoption and passage of such state constitution and laws, as well as those contracted after the same, and against liens by judgment or decree of any state court, any decision of any such court, rendered since the adoption and passage of such constitution and laws, to the contrary notwithstanding." Rev. Stat. of U. S., § 5,045.

This enactment which we have upheld in *Lamb* v. *Chamness*, 84 N. C., 379, gives efficacy to the homestead allotment, when made in the bankrupt court, to the same extent in value and duration, as prescribed by the law of the state, and effaces any interfering and attaching liens, created by judgment or decree, which interferes with its enjoyment.

As the exemption does not terminate until the youngest child of the debtor attains full age, and the plaintiff himself shows that two of the defendants are minor children of the intestate, the estate of the debtor, even subject to the homestead, cannot be sold by the administrator while the homestead remains (*Hinsdale* v. *Williams*, 75 N. C., 430), even if it was still in him. The defendants, however, have no estate by descent from their father, but their title has been acquired under the assignee's sale and deed to Carter and his conveyance to them, and the judgment lien, if in force, follows the transmission of the land, adhering to it in the hands of the owner. There is, consequently, no descended estate, vesting in the heirs, as such, which the administrator can sell; and the creditor is left to enforce his lien by a remedial proceeding against those in whom the title is vested, and perhaps such as is authorized by section 319 of C. C. P.

In any view of the case, the plaintiff must fail in his action. There is no error, and the judgment dismissing the action must be affirmed.

No error. Affirmed.

JESSE E. FRALEY v. JAMES A. KELLY and others.

Homestead—Bankruptcy—New Promise.

1. A homestead is allowed against a judgment obtained on a new promise to pay a debt after the discharge of the defendant in bankruptcy in 1870.
2. A promise of defendant to pay a debt discharged in bankruptcy, does not revive the original contract so as to re-invest it with an actionable quality, but only recognizes it as the consideration to support the new promise.

(*Wiseman* v. *Penland*, 79 N. C., 197; *Fraley* v. *Kelly*, 79 N. C., 348, cited and approved).

CIVIL ACTION tried at Fall Term, 1882, of DAVIE Superior Court, before *Gudger, J.*

The plaintiff obtained a judgment in 1878 (on a note dated in January, 1866, as he alleges) against the defendant, Kelly, which was affirmed in the supreme court, from which executions have regularly issued but without satisfaction. Kelly owns and has owned a valuable tract of land in Davie county since the year 1866, which is subject to the dower of his mother. On the 13th of March, 1873, he conveyed the same in trust to the defendant, J. M. Clement, to secure a certain debt, with power to sell the land if the debt was not paid within one year from the date of the deed; and on the 16th of September, 1876, he executed another deed in trust to the defendant, W. A. Clement, to secure a debt due by note for $403.25, with like power to sell. Besides these deeds, there were several judgments docketed in the superior court, which had a lien on the land. It was admitted that the debts secured by said deeds had never been satisfied. The defendant, Kelly, was adjudicated a bankrupt and obtained his discharge in 1870.

The plaintiff asks the court to compel the defendant, J. M. Clement, to sell Kelly's interest in the land conveyed to him, and after paying the secured debt, to satisfy his judgment and the costs incident thereto in the superior and supreme courts. The defendant did not resist the sale of the land, but contended

that he was entitled to his homestead (subject to the dower of his mother and the mortgage liens) against the debt of the plaintiff.

His Honor adjudged that the defendant was entitled to his homestead against the debt of the plaintiff, and that W. A. Clement be appointed a commissioner to sell said land, after allotting the defendant's homestead, and apply the proceeds first to the satisfaction of the mortgages, then to the docketed judgments having liens prior to the plaintiff's claim, and the surplus to the plaintiff's judgment. From which judgment the plaintiff appealed.

Messrs. J. M. McCorkle and *W. H. Bailey*, for plaintiff.
Messrs. Watson & Glenn and *Gray & Stamps*, for defendant.

ASHE, J. The question presented by the appeal is, was there error in the judgment of the superior court in holding that the defendant, Kelly, was entitled to his homestead in the lands, described in the pleadings, against the claim of the plaintiff, and this involves the inquiry, whether the plaintiff's judgment was founded upon the original contract evidenced by the note, given in 1866, or on the new promise to pay that debt; if upon the new promise to pay after going into bankruptcy, there can be no question he is entitled to his homestead against the judgment.

The plaintiff says the action was upon the note, but the defendant says that is not so; that the action was brought upon the new promise. This made it incumbent on the plaintiff to establish the fact that the action was founded upon the note, which he has failed to do, and the legal presumption is against him; for in the absence of proof to the contrary, a judgment is presumed to have been properly and regularly rendered. *Wiseman* v. *Penland*, 79 N. C., 197.

The note given in 1866 was extinguished by the discharge in bankruptcy of the defendant, Kelly, in 1870, and no action could properly be brought upon it after that. The plaintiff was with-

out remedy except upon a new unconditional and unequivocal promise to pay the debt, and the action must be brought upon the new promise. The new promise does not revive the original contract so as to re-invest it with an actionable quality, but only recognizes its moral obligation, so far as to admit it as the consideration to support the new promise. This is well settled doctrine. It has been decided in this state time and again, and in this very case, which has been twice before this court—reported in 67 N. C., 78, and in 79th N. C., 348. In this latter case it appears from the record that the action was upon the new promise, and the issue submitted to the jury was, "did the defendant, after he went into bankruptcy and before he obtained his discharge, make an unequivocal promise to pay the debt he owed the plaintiff?" to which the jury respond, "yes."

"This finding," say the court, "would seem to leave no question in dispute. We have said several times that the defendant is liable on the new promise under such circumstances." In support of the position, the court cited the cases of *Fraley* v. *Kelly*, 67 N. C., 78; *Hornthal* v. *McRae*, *Ib.*, 21; *Henly* v. *Lanier*, 75 N. C., 172; and to the same effect is *Kirkpatrick* v. *Pattershall*, 13 Ex. Rep., 770, M. & W.

Holding, as we do, that the judgment of the plaintiff was founded upon the new promise, it was a new contract, and the defendant, Kelly, is entitled to his homestead against it. But how his right of homestead and the widow's right of dower are to be adjusted, and what portion of the land is to be sold, are questions we are not called upon by the record to decide. The defendants have not presented these questions by exception to the judgment below. They have shown they were content with the judgment by not appealing. There is no error. This must be certified, &c.

No error. Affirmed.

R. W. WHARTON, Adm'r, v. OLIVIA F. TAYLOR.

Homestead and Personal Property Exemption.

1. The homestead and personal property exemption are fixed by the constitution, and neither the value nor duration thereof can be increased or diminished by the legislature; therefore, the act of 1876–'77, ch. 253, in so far as it undertakes to change the same, is unconstitutional.
3. The land in dispute in this case may be sold, subject to the widow's dower, to pay the intestate's debt.

(*Martin* v. *Hughes*, 67 N. C., 293, overruled).

CONTROVERSY submitted without action under section 315 of the Code, and heard at Fall Term, 1882, of BEAUFORT Superior Court, before *Gilliam, J.*

William D. Taylor, seized of an undivided fourth part of an estate in fee in a tract of land not exceeding $500 in value, died on the 19th of April, 1881, intestate, leaving a wife (the defendant) and one child, an infant of the age of three years, who also died a few days thereafter. The intestate, after May 1st, 1877, contracted a debt of about $380, which remains unpaid, and owes no other debt. The plaintiff took out letters of administration on his estate in December, 1881, and applies for an order to sell the intestate's interest in said land for the payment of the debt.

His Honor, being of the opinion that the defendant is the owner of the said fourth interest in the land, and that the same is not chargeable with the debt of the intestate husband, gave judgment accordingly, and the plaintiff appealed.

No counsel for plaintiff.
Mr. C. F. Warren, for defendant.

SMITH, C. J. In *Martin* v. *Hughes*, 67 N. C., 293, RODMAN, J., delivering the opinion and referring to article ten, section two

of the constitution, uses this language: "There is nothing in that or in any other section of the constitution to forbid the legislature from exempting *a larger homestead*. It cannot reduce what the constitution provides, but any general assembly had the same power which the constitutional convention had to exempt a homestead, and has now absolute power *to enlarge the homestead given by the constitution in the matter of value*, or duration of estate, subject only to the restriction in the constitution of the United States, that it shall not thereby impair the obligation of contracts." This case was decided at June term, 1872, and the general assembly, acting upon this intimation of its reserved authority, on March 10, 1877, passed the following act:

"AN ACT TO SECURE TO OWNERS OF REAL ESTATE, RESIDING IN THIS STATE, A HOMESTEAD IN FEE SIMPLE.

The General Assembly of North Carolina do enact:

SECTION 1. The homestead of any resident of this state shall not be subject to the lien of any judgment or decree of any court, or to sale under execution or other process thereon, growing out of any debt contracted, or cause of action accruing after the first day of May, 1877, except such as may be rendered or issued to secure the payment of obligations contracted for the payment of said homestead, or for laborers' or mechanics' liens for work done and performed for the claimant of said homestead, or for lawful taxes.

SECTION 2. This act shall be in force from and after its ratification."

The title of the act and the sweeping exemption, provided in the first section, from the class of liabilities mentioned, admit, if they do not require, an interpretation (and such seems to have been the view of the judge in the court below), which secures a perpetual exoneration of the land on which the homestead has been placed, to the full extent of the debtor's estate therein, and without limit of time—thus transmitting his estate, however

large, as if no such debts existed, to the person entitled thereto by law. If this be the scope and operation of the act, has the general assembly authority to pass it?

With the natural reluctance which every judicial tribunal must feel to declare that a coördinate department of the government has overstepped the constitutional limits of its power, and the more especially when it is acting upon an expressed opinion of this court, the duty is imperative to uphold the fundamental law, when it is clearly incompatible with an act of legislation, and to hold the latter void. Such is our conviction of the character of the present enactment upon the suggested construction of its import and purpose. The exemption of part of the insolvent debtor's property from final process, must have been inserted in the constitution and made part of it for some purpose, and we can conceive of none other except to make these provisions fixed and permanent, and to place them beyond legislative interference and the influence of a varying popular opinion. They are intended for the protection of both debtor and creditor, determining the value of the estate which the insolvent debtor shall retain, if he posses so much, and subjecting all in excess to the claims of the creditor. These ascertained and fixed terms define the exemption in land and personalty, the value and duration; and an enlargement as well as a diminution, in either, is in effect to make a new exemption and displace, *pro tanto*, that contained in the constitution.

How can the legislature enlarge the value of the reserved homestead beyond one thousand dollars, when the constitution declares that that sum shall not be exceeded? How can the value of the retained personal estate be increased or lessened when it is definitely fixed at five hundred dollars? By what authority can the land exemption be extended beyond the prescribed time, which does not equally permit that time to be lessened, and the homestead be made to expire sooner?

It is manifest that the policy of engrafting the provisions of the exempting clauses in the constitution was to give them sta-

bility and permanence, as a system, and to allow no modifications except when made by the same power that framed the organic law, of which it forms a part. Thus is secured a reliable basis for fair dealing and the making of contracts in the future. No satisfactory reason can be assigned in allowing a legislative increase for the debtor's benefit, that does not apply with equal force to an act which abridges it for the creditor's benefit. Both are alike within the protection of the law. If the exemption be changed in either way, it is no longer the exemption prescribed by the constitution.

It is true the constitution describes the homestead as "not exceeding in value one thousand dollars," not thereby as intending to confer authority on the legislature to reduce it below that amount, but as the land and buildings of which it should consist would be of very different values, some far exceeding others, the exemption of the land thus protected from sale, should, in no case, be above that valuation.

It is our opinion that in so far as the act undertakes to prolong the homestead beyond the limit fixed in the constitution, it is repugnant to that instrument, and void.

It follows, therefore, that the land is subject to sale, but it is also subject to the widow's dower therein; and no merger of her right of dower in the remainder in fee takes place to deprive her of it. There is error.

The cognizance of this cause belongs to the probate court, but as it would of necessity have to be transmitted to the judge for his decision of the law involved, we so consider it, and he will transmit the record in accordance with our ruling to the probate judge for further proceedings in the cause. Let this be certified.

Error. Reversed.

JOSEPH J. FOX and wife v. ROBERT BROOKS and others.

Homestead—Obligation contracted for the purchase of Land.

A party, whose contract for the purchase of land has not been discharged, is not entitled to homestead against a judgment obtained on the same; therefore, where the bargainee contracted with the bargainor to pay a note which the latter owed to a third person, in consideration of a land purchase, *it was held* that the land is subject to the payment of such debt.

(*Whitaker* v. *Elliott*, 73 N. C., 186; cited and approved).

EJECTMENT tried at Fall Term, 1882, of CHATHAM Superior Court, before *Shipp, J.*

The *feme* plaintiff claimed the land by virtue of a sheriff's sale (and deed to her) under an execution issued upon a judgment, duly docketed in the superior court of Chatham county, rendered on a note as follows: "One day after date we promise to pay Frances Dorsett, or order, the sum of fifty dollars for value received, as witness our hands and seals, March 5th, 1856. (Signed and sealed by William B. Dorsett, Joseph J. Fox and J. T. Brooks)."

The defendant, as tenant of his co-defendant, Joab T. Brooks, claimed the land as the homestead of said Brooks.

One Gilliland, introduced as a witness by the plaintiff, testified that he was the agent in 1869, and for some time before, of Dorsett, who was the owner of the note upon which the judgment was rendered, and the note was given by William B. Dorsett and Joseph J. Fox for money borrowed from Frances Dorsett; that in the fall of 1869, the defendant, Brooks, and Dorsett, who was the principal in the note, came to witness and he (witness) showed them the note; that they, in the presence of each other told the witness that said Brooks had bought from said Dorsett the land in controversy, and that he (Brooks) was to pay the said note as part of the purchase money due by him to Dorsett; that the payment of the note was to be the first of the purchase money

paid on the land, and was to be credited on the purchase money; and thereupon the said Brooks signed the note, saying that he was safe in doing so, as the payment of the note was to be a credit on the purchase money of the land in question.

The defendant, Brooks, in his own behalf then testified that he did not buy the land from Dorsett until 1870, and that he signed the note in question simply as surety for Dorsett, who was his father-in-law, and who was then expecting to leave the state, and was threatened with trouble on account of the note.

There was other evidence that the land was purchased by Brooks in 1870. It was admitted that no homestead was laid off to Brooks prior to the sale of the land by the sheriff.

The only issue submitted to the jury was as follows:

"Were the plaintiffs at the time of the commencement of this action the owners in fee of the land in question?"

The defendant's counsel asked His Honor to instruct the jury, 1st. "That if they shall find that William B. Dorsett owed Frances Dorsett the note upon which judgment was obtained in 1856, and that J. T. Brooks signed the same in 1869, and promised to pay out of the money he owed William B. Dorsett for the purchase of the land, then the plaintiff cannot recover. 2d. That from the evidence adduced, the note was not given in consideration for the purchase of land by J. T. Brooks from William B. Dorsett."

In response, His Honor charged the jury that if they were of the opinion from all the testimony that the defendant, Brooks, signed the note as surety for Dorsett, or that he signed it and undertook its payment to relieve said Dorsett from threatened trouble, then the plaintiff could not recover, the defendant being entitled to the land in question as the homestead exemption of the defendant Brooks; but if they shall be of opinion that Brooks signed the note and undertook its payment, in consideration of the purchase of the land in question, and that he was moved to sign it and undertook its payment as part of the price of the land, and that if the signing of the note by Brooks, was on his

part an obligation contracted for the purchase of the land in question, then the defendant, Brooks, would not be entitled to his homestead exemption in the land, and the plaintiff would be entitled to a verdict.

The jury found the issues in favor of the plaintiffs. There was judgment accordingly, and the defendant, Brooks, appealed.

Mr. John M. Moring, for plaintiffs.
Mr. John Manning, for defendant.

ASHE, J. The only question presented by the record is, whether the defendant is entitled to his homestead in the land in controversy. Article ten, section two of the constitution provides that every homestead and the dwelling and buildings used therewith, not exceeding in value one thousand dollars, to be selected by the owner thereof, &c., shall be exempt from sale under execution, or other final process obtained on any debt. But no property shall be exempt from sale for taxes or for the payment of obligations contracted for the purchase of said premises.

And this raises the inquiry, whether the note signed by the defendant upon which the judgment was rendered, under which the land was sold, was such an obligation—contracted for the purchase of the land in question—as is contemplated by the constitution.

In the case of *Whitaker* v. *Elliott*, 73 N. C., 186, this court said: "In the construction of a state constitution, words are not to be taken in a narrow and technical sense, but in a general and popular sense, so as to give effect to the intent of the people in adopting it. The word 'obligation,' as here used, therefore means a debt contracted to be paid or a duty to be performed by the purchaser, as the consideration of the purchase of the premises."

The term "obligation" then, is not used in its technical sense, but embraces every contract to pay for the land, whether by specialty or parol; but the contract, we are of the opinion, must

be made with the bargainor and the consideration must be the price of the land purchased.

In this case the defendant purchased the land from William Dorsett, and, as part of the consideration for the purchase, agreed to pay the amount of the note which said Dorsett owed to the plaintiff--the payment of which was to be credited on the amount which the defendant had contracted to pay Dorsett for the land. The obligation to pay the note was contracted with Dorsett, the bargainor, as the consideration in part of the purchase, as much so as if he had given his note to Dorsett for the price, and he had delivered it over to the plaintiff in payment of his note. In that case, there can be no doubt the land for the purchase of which the note was given would be subject to its payment.

When the defendant, in consideration of the purchase of the land, promised Dorsett that he would pay the amount of the note which the plaintiff held on him, an action of assumpsit would have lain in favor of the plaintiff against the defendant, the statute of frauds not being relied upon, as in this case; and although the defendant signed the note and thereby became liable to the plaintiff, that did not absolve him from his original contract with Dorsett to pay the note.

Suppose when judgment was obtained upon the note against Dorsett, Fox and the defendant, the execution issuing thereon had been satisfied out of the property of Dorsett, can it be questioned that Dorsett would have had the right to recover the amount collected from him, from the defendant, for the breach of his promise originally made to pay the note? The contract between Dorsett and the defendant was, that the latter, in consideration of the purchase money, should pay the note which Dorsett owed the plaintiff, not that he should *sign the note*. His doing that was a voluntary act, and his obligation to Dorsett continued until the note was paid. There is no error.

The judgment of the superior court of Chatham county is affirmed.

No error. Affirmed.

D. E. ALBRIGHT and wife v. G. B. ALBRIGHT and others.

Homestead—Judgment—Execution.

1. The provisions of the law, securing a homestead and personal property exemption, are not *necessarily* void as against "old debts," but only so, in case they should defeat their payment in whole or in part. Even against such claims, the debtor has a right to have his allotments made and the excess sold and applied in payment thereof.
2. A judgment on a debt, made since 1868, rendered and docketed before one on a debt made anterior to that time, will not be displaced in favor of the latter, even to save the homestead, but operates as a first lien on the land not included in the homestead.
3. An actual levy of a junior judgment upon the debtor's personal property, though not privileged against the same, entitles the creditor to the fund arising from the sale of the excess; but the $500 exemption of personal property, whether set apart or not, is wholly exempt from the process.
4. The debtor, in such case, whose property was both under mortgage and judgment liens, has an equity to have the same sold to the best advantage, after all parties interested are brought before the court and their priorities determined.

(*Cheatham* v. *Jones*, 68 N. C., 153; *Burton* v. *Spiers*, 87 N. C., 87; *Wilson* v. *Patton*, *Ib.*, 318; *Duval* v. *Rollins*, 71 N. C., 218; *Curlee* v. *Thomas*, 74 N. C., 51; *Mayer* v. *Adrian*, 77 N. C., 83; *Gaster* v. *Hardie*, 75 N. C., 460; *Crews* v. *Bank*, 77 N. C., 110, cited and approved).

MOTION for injunction, in an action pending in GUILFORD Superior Court, heard at Chambers on the 26th of December, 1882, before *Gilmer*, *J.*

Both parties appealed from the ruling of the court below.

Messrs. Dillard & Morehead and *Hinsdale & Devereux*, for plaintiffs.

Messrs. Scott & Caldwell, for defendants.

RUFFIN, J. The plaintiff, Daniel E. Albright, complains that by reason of the multiplicity and conflicting character of incumbrances upon his estate, and the machinations of the defen-

dants, George B. Albright and Kirkman, in pressing certain of them to collection, he is in danger of having his property sacrificed, and of losing the homestead and personal property exemption, which it is the policy of the law he should have. To avoid this, he asks the court in this action to bring all the parties before it to ascertain their respective rights and priorities, to sell the property to the greatest advantage and free of all cloud, and in the meantime to restrain the said defendants from selling under their executions, which they have placed in the hands of the sheriff.

There seems to be so little controversy between the parties as to the facts of the case, that it may almost be said they are admitted to be as follows:

There are five judgments against the plaintiff. Two of them known as the Edwards and Sharpe judgments, and amounting, together, to the sum of $1,040.19, were rendered upon contracts made prior to 1868, and docketed respectively in December, 1873, and August, 1874. Three of them, known as the William Albright, the Kirkman and the George Albright judgments, and amounting in the aggregate to $1,830.59, were founded upon contracts made subsequently to 1868, and were all procured and docketed after the two first mentioned judgments.

Besides these debts, the plaintiff owes one of $280 to the defendant, Adams, secured by a mortgage upon certain of his lands, executed and registered in 1871; and another of $105, which was imposed upon his land as a charge to make equality in the division of the lands of his father. He owns the following real estate: His home place, consisting of two hundred and forty-seven acres; an undivided third interest in a thirty acre tract, upon which there are grist and saw-mills; and a seventy-six acre tract, subject to the Adams mortgage, and the charge for equality.

In October, 1882, the defendants, George B. Albright and Kirkman, sued out executions upon their judgments, under which they caused the plaintiff's personal property exemption of $500 to be set apart to him, and his homestead, including his dwelling and a hundred acres of his hom-eplace to be allotted.

The excess of his personal property amounting to $64, they then caused to be levied on under their executions and to be sold, and the proceeds is now in the hands of the officer. They also caused the excess in the lands, over and above the homestead, to be levied on under their same execution, and advertised for sale in November of that year.

Before the day of sale, one Ogburn, who, in the meantime, had purchased the Edwards and Sharpe judgments, caused executions thereunder to be placed in the sheriff's hands and the same lands levied on by the defendants to be advertised for sale.

The defendants thereupon begun an action against him, insisting that as he had two sources of payment (the lands included in the homestead and those in excess thereof) while they had but one (the excess), he should be confined to the former, and not be permitted to defeat altogether the satisfaction of their judgments.

During the pendency of this action against Ogburn, the defendant, Albright, purchased from him the Edwards and Sharpe judgments, and having thus acquired the control of them, the action against him was allowed to drop.

With a view still to secure to himself and Kirkman the advantage sought in that action, the defendant, Albright, has since caused executions to issue under the Edwards and Sharpe judgments, and to be levied upon the personal property which had been set apart to the plaintiff as his exemption, and after laying off to him such articles as are exempted from sale under Rev. Code, ch. 45, §§ 7 and 8, has advertised the residue for sale. The same defendants have also renewed their levies under their junior judgments upon the lands in excess of the homestead, and have advertised them for sale, intending, as the plaintiff alleges, and as is not denied in their affidavits, hereafter to have the homestead sold under the older judgments, and thus deprive him altogether of his homestead and exemptions.

The value of the lands above the homestead is the only controverted fact between the parties: the plaintiff insists that if

fairly brought to sale, they are of value sufficient to pay all, or nearly all, the claims against him, whereas the defendants insist that they are not, at the best, worth more than two thousand dollars, which amount is less than two-thirds of the debts.

The cause being heard at Chambers on the 26th day of December, 1882, upon a motion for an injunction, before His Honor, Judge Gilmer, he granted an order restraining the defendants from selling the personal property levied on under the Edwards and Sharpe judgment, but declined to give an order to restrain the sale of the lands in excess of the homestead under the junior judgments, in favor of the defendants, Albright and Kirkman. From this refusal the plaintiff craved an appeal, and from the order restraining the sale of the personalty the defendants appealed.

The plaintiff has a clear constitutional right to his exemptions in both his realty and personalty, and this right he has against each and every one of his creditors, without regard to the date of his demand. It is a mistake to suppose that the law giving such exemptions is necessarily void, as against debts existing prior to its adoption. It is only so in case there should not be a sufficiency, after allowing the exemptions, fully to satisfy them, whereby they would be defeated. Otherwise, they are as operative and constitutional as to them as against any other demand whatsoever; that is to say, the debtor has a right to have his allotments made, setting apart specifically his homestead and his exemptions, and then to have the creditor, though his claim be an old one, to exhaust all his other possessions of every kind, before he shall put his hands on them. *Cheatham* v. *Jones*, 68 N. C., 153; *Burton* v. *Spiers*, 87 N. C., 87.

It is true, that if a judgment upon a contract, made since 1868, be rendered and docketed before a judgment on a contract made anterior to that date, the courts will not displace it in favor of the latter, even to save the debtor his homestead, but will leave it, as was done in *Wilson* v. *Patton*, 87 N., C., 318, to operate as the first lien upon the lands not included in the homestead.

So, too, as in this case, the defendants having by an actual levy under their judgments, though junior in point of docketing, and though not privileged against the plaintiff's right to his exemptions, acquired the first lien upon the personalty, are entitled to the exclusive benefit of the $65 arising from the sale of the excess in that species of property. But as to five hundred dollars worth of personalty, whether set apart or not, the defendants are wholly excluded, and do not even occupy the position of creditors. *Duval* v. *Rollins*, 71 N. C., 218; *Curlee* v. *Thomas*, 74 N. C., 51.

And as to the realty, the Edwards and Sharpe judgments are not only privileged debts, but they constitute the first docketed liens thereon, and are only subject to the plaintiff's right to have them satisfied out of his other property of whatever nature, so as, if possible, to secure him a homestead; and his right to such exemption is to be determined as if those two debts were all he owed.

Such is the plaintiff's plain and inviolable right, and what then is his equity? It is to have his property sold to the best advantage, and so as to derive the most money therefrom, and that this may be done, to have all the parties before the court, their priorities determined, and the property sold free of all clouds and conflicting incumbrances.

The very doubts expressed by the defendants as to the value of the lands give force to this equity of the plaintiff, and furnish a reason why the court should intervene and protect him from the consequences of a sale made uncertain and hazardous by the course which the defendants have pursued in the matter.

In *Mayer* v. *Adrian*, 77 N. C., 83, there was a complication growing out of a number of conflicting liens, and it was held to be peculiarly within the jurisdiction of a court of equity to have all the parties brought before it, ascertain their debts, adjust their equities, and declare their respective rights, in order that the sale, when made, might pass a clean title to the purchaser. It was upon this ground alone that the court assume jurisdiction in

Gaster v. *Hardie*, 75 N. C., 460, and the very course recommended to be taken in *Crews* v. *Bank*, 77 N. C., 110.

The court, therefore, thinks His Honor erred in not restraining the defendants from selling any portion of the land, until the rights of the parties could be adjusted, their several priorities ascertained and declared, and the property sold with a clear title, so as to command a fair price; and especially does this course seem appropriate, after the court had assumed jurisdiction as to the personalty.

The order refusing the injunction as asked for by the plaintiff is declared to be erroneous, while that granting the injunction as to the personalty is affirmed, and this will be certified to the superior court of Guilford county, to the end that the injunction, as asked for, may be duly granted and continued until the trial of the cause.

Error. Judgment accordingly.

A. J. BRANNON, Assignee v. R. W. HARDIE, Sheriff.

Personal Property Exemption—Trusts and Trustees—Sheriff—Execution.

Assignment of personal property to a trustee to secure creditors—the assignor reserving a sufficiency to make up his personal property exemption—the allotment to be made, before a final disposition of the trust fund, by freeholders in the manner prescribed by law; *Held*, that the title to the goods, not required to make up the exemption, is in the trustee, and a sheriff has no right to levy upon and sell the same.

CIVIL ACTION tried at Fall Term, 1882, of CUMBERLAND Superior Court, before *Gilmer, J.*

One W. D. Smith, becoming involved in debt and unable to carry on his business, on December 20th, 1878, conveyed his

stock of goods and some other articles to the plaintiff (in trust to secure and pay his creditors) by a deed containing a reservation in these woods: "Saving and reserving, however, unto the party of the first part, and exempting from the operation of this deed enough of said property, goods, wares, and merchandize and evidences of debt, to make for the said party of the first part such personal property exemption as may be allowed, according to the constitution and laws of the state, to be set apart as hereinafter directed."

The deed in a subsequent clause directs the allotment of the exempted articles to be made, before a final disposition of the trust fund, by three disinterested freeholders in the manner prescribed by law.

On the day succeeding the execution of the deed, the defendant, sheriff, having in his hands an execution issued against the assignor, Smith, proceeded to have set apart and valued such articles of personalty as were selected by him in the required amount, and constituting his exemption. The largest portion of the allotment was made up of articles outside of the assignment, and the residue taken from those described in it. The defendant thereupon seized other goods mentioned in the assignment, not exceeding the value of the articles appropriated to the exemption and not embraced in the deed, and sold the same to satisfy the writ.

This action is to recover the value of these goods, and the only question brought up on the appeal is as to the proper construction and operation of the assignment, and whether the title to the goods, thus levied on and sold, vests in the plaintiff.

On the trial of the issues, the defendant asked the court to instruct the jury that goods of the full value of $500 did not pass under the deed to the plaintiff, and that Smith, the debtor, had a reserved interest in the stock, equal in value to the articles appropriated from other of his property in making the exemption, liable to execution.

The court declined to put this construction upon the words of the asssignment, and charged that such goods only were included in the excepting clause as claimed by the debtor to make up his exemption, and the other goods, not so required, passed to the plaintiff.

There was a verdict and judgment for the plaintiff, and the defendant appealed.

Messrs. N. W. Ray, and *G. M. Rose*, for plaintiff.
Messrs. Hinsdale & Devereux, for defendant.

SMITH, C. J. After stating the case. We entirely concur in His Honor's interpretation of the instrument, and that its operation was to convey to the plaintiff all the goods enumerated, which were not in fact used nor required in making up the value of the property which the debtor was entitled to retain exempt from execution.

All the described property of the debtor is assigned, subject to such deduction as he could claim if he had executed no assignment and remained the owner. The reservation is only of the right to have exempted such as might be needed in making out the exemption; and when articles are withdrawn from those assigned, all that remain belong to the plaintiff, and the reservation is exhausted. It is too plain to admit of dispute that no interest in the goods is retained by the debtor on which an execution can be levied. All the property mentioned in the deed—that to be allotted as exempt and that not required for such purpose—is beyond the reach of legal process; and the manifest object is to pass to the trustee everything which should not turn out to be exempt. If the debtor had died after his assignment and the right of exemption lost, undoubtedly the trustee would have taken all, and the like result must follow if the exemption is of other goods in whole or in part, as to what are left.

The only case we have found that seems to have a bearing upon the question, from a brief note in Abbott's U. S. Digest,

is contained in a report to which we have not had access, *Thurston* v. *Masteson*, 9 Dana (Ky.), 228, and is to this effect: A conveyance of all the grantor's land in a certain district, reserving 1,000 acres to be taken at the grantor's election in any part of the granted premises; the grantee may hold the whole until the grantor makes his choice and designation of the 1,000 acres.

This case seems to establish the proposition that all the goods are transferred, and the property remains in the assignee, until the reserved part is separated and allotted to the debtor as exempt. But our case is not presented in this aspect, since the separation was effected before the sheriff undertook to make the levy, and when the sole interest in what remained was in the plaintiff.

There is no error, and the judgment must be affirmed.

No error. Affirmed.

J. B. GRANT v. M. EDWARDS and others.

Petition to Rehear—Jurisdiction—Excusable Neglect.

Upon petition to rehear, this court will not disturb the judgment upon the ground of alleged fraud: an independent action to that end should be brought in the superior court. Nor do the facts here constitute a case of excusable neglect.

(*Kincaid* v. *Conly*, Phil. Eq., 270; *McLean* v. *McLean*, 84 N. C., 366; *McDaniel* v. *Watkins*, 76 N. C., 399; *Williams* v. *Williams*, 70 N. C., 665; *Burnett* v. *Nicholson*, 86 N. C., 99; *Whissenhunt* v. *Jones*, 78 N. C., 361, cited and approved).

PETITION to rehear filed by the defendant and heard at February Term, 1883, of THE SUPREME COURT.

Mr. R. B. Peebles, for plaintiff.

Messrs. Reade, Busbee & Busbee, for defendant.

RUFFIN, J. This cause was decided at February term, 1882, of this court (86 N. C., 513), and is now before us upon a petition to rehear it. No error is assigned as to the defendant, Edwards, but only as to the defendant, Deloatch.

As to him the case is as follows: The plaintiff commenced this action in 1878, by a summons regularly served upon both defendants, and returnable to the fall term in that year of the superior court of Northampton county. In his complaint which was filed at the return term, he alleged that he was the owner in fee, and entitled to the possession of a certain specifically described tract of land, of which, however, the defendants had possession and were unlawfully withholding the same.

At the same term the defendant, Edwards, filed an answer, denying the plaintiff's title to the land, and setting up title in himself, and the right to the possession thereof. The defendant, Deloatch, filed no answer at that, or any other time. The cause was tried at fall term, 1881, when the jury rendered a special verdict, as set out in the statement of the case as reported in 86 N. C. Rep., 513, except that its conclusion was not in favor of the *defendant*, as is there stated, but of the *defendants*, in case the court was of opinion with them.

Upon the verdict, judgment was rendered for the *defendants*, and the plaintiff appealed. In this court, that judgment was reversed, and judgment entered for the plaintiff against both the defendants, according to the finding of the jury.

In his petition for a rehearing, the defendant, Deloatch, now alleges that he has never been in possession of any portion of the land described in the plaintiff's complaint; that in 1877, about one year prior to the commencement of the action, he purchased from the defendant, Edwards, a very small portion of the land, but as the part so purchased was altogether in woods, he took no possession of it or derived any profit from it, nor could he in its then condition have derived any profit from it; that soon after the service of the summons upon him, he saw the plaintiff and informed him that he should not on his part defend the

action, since the only question involved was, whether the defendant, Edwards, was entitled to a homestead or not, and this could be determined as well without his participation in the contest as with it, to all of which the plaintiff assented; that acting upon this idea, he retained no counsel and filed no answer, nor did he take any part in the trial or assent that the jury should return a special verdict; that though his purchase of part of the land was made only in 1877, he is fixed by the terms of the judgment with having received rents for seven years anterior to that date.

The errors assigned are:

1. That the judgment is erroneous as to the defendant, Deloatch, in that it was rendered against him without the intervention of a jury.

2. That he is entitled to have it set aside upon the ground of excusable neglect, and because it would be a fraud on the part of the plaintiff to avail himself of the judgment after the understanding entered into between the parties, as set out in the petition of the defendant.

The court can perceive no ground upon which it should be required, or could even feel justified to reverse the judgment rendered in this cause.

Not upon the ground of the fraud suggested; for that would involve the necessity of trying issues of fact, which from its very constitution the court is incompetent to do. In *Kincaid* v. *Conly*, Phil. Eq., 270, it was expressly declared, and after much consideration, that a judgment of this court could be impeached for fraud only by an independent action, of which the superior court alone had original jurisdiction, and this was reäffirmed in the same case as reported in 64 N. C., 387.

Conceding the facts of the case to be as set out in the defendant's petition, it is plain that an error of fact is involved in the judgment, and that the plaintiff has recovered against him a much larger sum than he was entitled to, but this was by reason of a failure of proofs in the cause, and not because of any error

of law, such as could be corrected on an appeal to this court. By his failure to answer the complaint, the plaintiff had it in his power to take judgment by default against him at any time, but this he was not bound to do before trying the cause as to his co-defendant, nor can there be any reason why the same jury should not assess the plaintiff's damages as against both of them.

Neither can we regard the neglect of the defendant to make his defence as in any manner *excusable*. From his own statement of the matter, it nowhere appears that the plaintiff promised, or gave him reason to believe, that he would not take judgment against him, or that he even knew of the nature, or date, of the defendant's claims to the land in dispute. The most, and indeed all, that he seems to have done was, to give his assent, which it might well have been supposed he would do, to the defendant's own proposition that he should offer no resistance to the action.

The defendant was regularly served with process which gave him full notice that, in case of his failure to make defence, judgment would be taken against him, according to the demand of the complaint, in which demand the amount of the damages claimed was specified. He was, therefore, affected with full notice of the judgment and every other step taken in the cause. *McLean* v. *McLean*, 84 N. C., 366; *McDaniel* v. *Watkins*, 76 N. C., 399. Being thus sued, he owed at the least that degree of diligence which a man of ordinary prudence might be expected to give to matters of similar importance, and this he fell far short of, not so much because of any misunderstanding he had with the plaintiff, as from mistaken notions of economy.

The case, therefore, falls distinctly within the principle declared in *Williams* v. *Williams*, 70 N. C., 665, where it was said that the court would not exercise its discretion so far as to set aside even an erroneous judgment, in favor of a party who had himself been guilty of laches.

So far as regards this court, there was nothing in the record which in the slightest degree was suggestive of any irregularity in the judgment of the court below. The jury appear to have

been regularly impanelled to try issues between the plaintiff and both the defendants; and this, as to the question of rents and profits, was strictly proper; the verdict rendered purported to be against them both, in case the court should hold the law to be against them upon the facts found; the judgment rendered was in favor of them both, and the notice of the plaintiff's appeal was served upon them both. So that, the judgment here was strictly according to the course of the court, and cannot upon any ground be impeached for a want of regularity.

The discrepancy between the amount of damages demanded in the complaint and that given by the verdict, is accounted for, we presume, by the fact that the jury assessed the plaintiff's damages up to the time of the trial. This, according to the authorities, it was proper for them to do in an action such as this, for the recovery of land. *Burnett* v. *Nicholson*, 86 N. C., 99; *Whissenhunt* v. *Jones*, 78 N. C., 361.

The variance might have been cured, and still might be cured by an amendment of the complaint. Rev. Code, ch. 33, § 17. Under the circumstances, however, we do not think it would be in furtherance of justice to permit it to be thus amended, but rather require the plaintiff to remit all in excess of the sum demanded in his complaint.

As thus modified the judgment heretofore rendered in this cause is affirmed.

PER CURIAM. Judgment accordingly.

D. M. MORRISON and another v. B. L. McLAUCHLIN and others.

Taxation—Tax Title.

1. Land should be listed for taxation in the name of the individual owners, and not in the name of the "estate" of one deceased.
2. A tax-title derived by a purchaser at sheriff's sale of land listed in the name of the "estate" of one deceased, is defective: the law requires personal service of notice of levy and sale upon the delinquent tax-payer.

(*Avery* v. *Rose*, 4 Dev., 549; *Saunders* v. *McLin*, 1 Ired., 572; *Kelly* v. *Craig*, 5 Ired., 129; *Jordan* v. *Rouse*, 1 Jones, 119; *Taylor* v. *Allen*, 67 N. C., 346; *Hayes* v. *Hunt*, 85 N. C., 303; *Busbee* v. *Lewis*, *Ib.*, 332; *Roberson* v. *Woollard*, 6 Ired., 90; *Bradford* v. *Erwin*, 12 Ired., 291; *State* v. *Lutz*, 65 N. C., 503, cited and approved).

EJECTMENT tried at Spring Term, 1882, of RICHMOND Superior Court, before *Shipp, J.*

Plaintiffs appealed from the ruling of the judge in the court below.

Messrs. Burwell, Walker & Tillett, for plaintiffs.

Messrs. French & Norment, and *T. A. & Frank McNeill*, for defendants.

SMITH, C. J. The plaintiffs derive title to the land in contest, described in their complaint, under a sale made for unpaid taxes, and the deed executed on October 20th, 1880, by the sheriff of Richmond county. The defendants are the heirs-at-law and devisees of one A. D. McLauchlin (a former owner, who died in 1852), still living and the issue of others since deceased. The taxes for which the land was sold, were due for the years 1874, '75, '76, '77, on the land, and to a small extent on sundry articles of personal estate listed with it, amounting in the aggregate to $85.84.

Matilda McLauchlin, one of the children of the deceased proprietor, lived on the land from the time of his death until her

own, in 1881. The defendant, B. L. McLauchlin, also resided for years upon the land, having the control and management of the estate of his grandfather, A. D. McLauchlin, and, as agent for all, paid the previous assessment upon the land. The land was entered upon the tax-lists, by whom listed does not appear, in the following form:

"The estate of A. D. McLauchlin, deceased," and as the "Goose Pond," this being the designation by which the tract was known and identified.

On the tax-lists and books produced in evidence was endorsed a memorandum in these words:

STATE ON RELATION OF Z. F. LONG, Sheriff of Richmond county, *vs.* THE ESTATE OF A. D. MCLAUCHLIN.	Levy on land of estate of A. D. McLauchlin, lying on Goose Pond, for default in payment of taxes for the years 1874, '75, '76, '77. Z. F. LONG, Sheriff of Richmond county.

It is unnecessary to consider the regularity and sufficiency of the subsequent action of the officer, which resulted in the sale and conveyance of the land thus charged, except the "ten acres on the south side," reserved to the plaintiffs, whose bid covers the entire taxes and the expenses incurred in the proceedings, inasmuch as the nonsuit was suffered upon an intimation from the judge, after the plaintiffs' testimony was all in, that the mode of listing the land was fatally defective and that the sheriff's sale and deed did not divest the title of the defendants, and the jury would be so instructed.

The sole inquiry before us is, therefore, as to the effect of listing the property, not in the names of the individual owners, or any of them, or by descriptive words, such as "heirs-at-law," or "devisees" of a former deceased owner whose name is given, by which, perhaps, the present owners could be ascertained and identified, of which we express no opinion, since the listing in the present case comes up to neither requirement.

The question can only be solved by reference to the provisions of the statute, in reference to the collection of taxes, in force when the proceeding was had.

But little aid can be derived from adjudications elsewhere, the regulations in different states for the enforcement of public levies being so unlike, nor from such as have been made in our own, beyond the general rule recognized that the proceeding being special and not according to the course of the common law, every essential requirement of the statute must be observed in order to transfer the estate of the delinquent to the purchaser at the collector's sale. *Avery* v. *Rose*, 4 Dev., 549; *Saunders* v. *McLin*, 1 Ired., 572; *Jordan* v. *Rouse*, 1 Jones, 119; *Taylor* v. *Allen*, 67 N. C., 344; *Hayes* v. *Hunt*, 85 N. C., 303; *Busbee* v. *Lewis*, *Ibid*, 332; *Kelly* v. *Craig*, 5 Ired., 129.

It becomes then necessary to examine the provisions of the act of 1879 for the levying and collecting of taxes (ch. 71), which prescribe the method of giving in property for taxation, and point out the course to be pursued in enforcing payment out of the property of delinquents.

Every person required to list property as owner, or having it in his possession or under his control, on the first day of June, must make out and deliver a statement thereof on oath to the township assessors (§ 4) within twenty days thereafter, § 5.

The statement must contain "the age of a party with reference to his liability to a poll tax," § 9.

Trustees are required to give in the property held by them for others, § 11.

One chargeable with taxes, who refuses to fill up and swear to his return or to answer questions in respect to his property, commits a misdemeanor and may be fined or imprisoned on conviction for the offence, § 15.

The assessor must make out an abstract of the lists given in to him, and return "such abstract and the tax-lists" to the clerk of the commissioners, "and also of such taxable property as has

not been given in, with the names of the occupant and supposed owner," § 17.

The tax-lists, when revised and settled by the county commissioners as to the separate townships, are to be delivered to the sheriff, one copy of each being kept in the office of their clerk, for collection. This list is to be put in a form furnished by the state auditor, and show in different columns "the sums due by each tax-payer to the state and to the county," § 25. The clerk is required to endorse thereon an order to the sheriff for collection under his hand and seal, the form of which is set out in the same section.

When the taxes become due, and they are due on the 1st Monday in September, the sheriff is directed, if the delinquent have personal property, to seize and sell the same, as he does under execution, § 35, par. 1.

If the "party charged" has no, or insufficient, personal property, the sheriff is commanded to levy upon the lands of the delinquent and "return a list of said levy to the clerk of the superior court, who shall enter the same in a book to be kept for that purpose." He must then "notify the delinquent of such levy, and of the day and place of sale, by *service of a notice, stating these particulars, on him personally*, with directions how to proceed if the delinquent cannot be found, § 35, par. 2.

There are further provisions for redemption in case a sale is made, and time is allowed to enable the delinquent or his agent to redeem. If not redeemed in twelve months, the sheriff is directed to convey the land to the purchaser, and this deed shall pass "all the estate in the quantity of the land for which the said purchaser bid, which the *delinquent*, his agent or attorney had at the time of the sale for taxes," § 39.

It is manifest from these clauses, that the name of the tax-payer should be associated with the description of the property listed, and against him personally the proceedings are directed to be had to compel payment of the tax, out of his personal estate

first, and then against his real estate, and this is an indispensable condition of their legal validity.

In the present case, we only know the name of a former owner, who died more than twenty-five years before the sale, whether with or without a will does not appear, nor whether the land passed to others by devise or descent. Who were the delinquent owners is nowhere shown in the proceedings, nor any such references to them as "heirs" or "devisees" of the decedent given, by which they could be found out, if that indeed would aid the purchaser.

In *Roberson* v. *Woollard*, 6 Ired., 907, it is held that an execution commanding the sheriff to sell the lands of "the heirs of Joseph Roberson, descended," was inoperative and void, because the defendants were not named or ascertained in the process, though they were in the judgment.

The question, who are the heirs of a deceased intestate, is one of law, to be decided by the court; but the identity of the persons, who by relationship are such, is one of fact. *Bradford* v. *Erwin*, 12 Ired., 291.

The statute declares that the order for collection, to be indorsed by the clerk, on the tax-list delivered to the sheriff, "shall have the force and effect of a judgment and execution against the property of the person charged in such list," § 25, and such was declared to be the law in *State* v. *Lutz*, 65 N. C., 503.

There were numerous other irregularities pointed out in the argument for the appellee, such as the including the tax on the personal with that on the real estate, and the sale for the satisfaction of both, and the operation of the statute of limitations upon the older taxes, but we pretermit the expression of an opinion upon any ruling except that which induced the nonsuit, and relates exclusively to the sufficiency of the tax-list, and the action under it, to warrant the subsequent sale to the plaintiffs. In this ruling we find no error, and the judgment must be affirmed. It is so ordered.

No error. Affirmed.

J. H. POWELL and others v. R. N. IVEY and others.

Fraud and Fraudulent Conveyances—Equity.

1. Where the fraudulent mortgagee reconveys the land to the fraudulent mortgagor, before any lien attaches in favor of the creditors of the former, they cannot subject the land to the payment of their debts.
2. A fraudulent vendee is under no legal obligation to reconvey, though morally bound to do so; but a court of equity will give no aid where both the vendor and vendee participate in the illegal transaction.

CIVIL ACTION tried, upon a referee's report, at November Term, 1880, of HALIFAX Superior Court, before *Graves*, *J.*

The defendants appealed from the judgment rendered.

Messrs. Mullen & Moore, for plaintiffs.

Messrs. Burton, *Batchelor* and *Day & Zollicoffer*, for defendants.

SMITH, C. J. The facts of this case are few and simple, as found by the referee and accepted and acted on by the court.

Richard N. Ivey, to whom the land in dispute belonged, with an express intent to defraud his creditors, on January 1, 1867, executed a mortgage deed therefor to his son, John R. Ivey, reciting his indebtedness to the mortgagee by bond, to which two others of his children were sureties, in the sum of one hundred and fourteen dollars, with interest from that date, and declaring the purpose of the conveyance to be to secure the same. There was nothing then due from the mortgagor to the mortgagee—no such bond was in fact given—and the deed was purely voluntary.

John R. Ivey accepted an agency at Rocky Mount for the Wilmington and Weldon Railroad Company, and entered into bond with the plaintiffs as his sureties for the faithful discharge of the duties of said appointment, in the sum of five thousand dollars, and for his dereliction in said agency, and the misapplication of

the money received in that capacity, he was sued by the company, and judgment recovered at spring term, 1871, of Edgecombe superior court, against him for the sum of $3,173.77, the amount due for his defalcation, and interest thereon, from the first day of December preceding. Of this sum he has paid $375, and the residue was paid over to the company on February 1, 1871, just before the institution of this suit, by the sureties.

On January 18, 1871, John R. Ivey reconveyed the land to his father by a deed reciting the prior mortgage and the purpose expressed in it, the full payment on January 1, 1868, of the secured debt, and bearing date on the 2d day of said month, to which the two alleged sureties to the bond are subscribing witnesses.

On January 24, 1871, six days thereafter, the said John R., by another deed, then executed, reciting the suretyship of the plaintiffs on his bond and his desire to secure them from loss by reason of their liability, conveyed to them "all his right, title and interest in the lands of Richard N. Ivey, conveyed to him by mortgage deed of January 1, 1867," with general warranty, as an indemnity against loss, with power of sale in case of his default in making payment of the sum for which he and his said sureties were liable to the company, for the term of two years thereafter.

A short time before reconveying to his father, at the latter's instance, the plaintiffs' attorney applied to an attorney of the said Richard N. Ivey for information in regard to the interest held by his son, John R., in the land, and stated that the latter contemplated securing them therewith. The attorney of said Richard N. stated to them that John R. had no interest in the land, that nothing was due to the latter from the former, and that the mortgage deed of January 1, 1867, was made to defeat the collection of a debt (in which the mortgagor was a surety merely) out of his estate.

On July 5, 1871, several judgments were rendered in behalf of different creditors against Richard N. Ivey before a justice of

the peace, which, on the 7th of the same month, were docketed in the office of the superior court clerk of Halifax, upon which executions issued, and the lands, the Fulghum tract, estimated to contain forty acres, and the tract whereon the execution debtor then resided, supposed to contain five hundred and twenty-five acres, were sold and conveyed to the defendant, James T. Gooch.

To the finding of the referee the court added the further fact that said Richard N., when he took the deed of reconveyance from his son, knew the intent of the latter to be to defraud the railroad company and prevent a recovery of its debt.

The action is prosecuted by the sureties to have the title declared to be vested in them by virtue of the deed of mortgage executed by John R. Ivey on January 24, 1871, and for a decree of foreclosure and sale of said lands, in order to their re-imbursement for money paid as his surety by each.

The referee, in his conclusions of law, declares the plaintiffs entitled to the relief sought, and so the court ruled, rendering judgment for the sale of the lands, unless the sum ascertained to be due the plaintiffs, and therein mentioned, be paid on or before a date fixed in the said judgment.

From this judgment the defendants appeal, and upon the hearing, the appeal was dismissed but re-instated on the docket, and the defendant, Richard N., having meanwhile died, his heirs, whose names are mentioned in the affidavit of R. B. Ivey, are made parties defendant in his stead.

Leaving out of view the controversy as to title between the heirs-at-law of the intestate, Richard N., and the defendant, Gooch, the purchaser at the execution sale, we do not concur in the opinion of the court that the plaintiffs have acquired any equity or right which will be enforced against any of the defendants. The reconveyance by the fraudulent mortgagee rested upon a moral obligation to restore the property to the fraudulent mortgagor, so that it may be directly subject to his debts, and thus, a decree of nullity be rendered unnecessary to creditors pursuing their remedies against his property. It is the undoing

of an unlawful act which ought not to have been done, and where no intermediate liens have attached, as in this case none had, the reconveyance will be upheld. This has been ruled in several cases cited by counsel, and with the suggested modification.

The case most in point, and directly sustaining the proposition, is that of *Clark* v. *Rucker*, 7 B. Mon., 583, decided by the court of appeals of Kentucky in 1847. The plaintiff's intestate made an absolute bill of sale of certain slaves held by him to his mother, the plaintiff, to place them beyond the reach of creditors, in case of an unsuccessful issue of a speculation in which he had embarked, and with a secret understanding that they were to be held in trust for the vendor's wife and infant child. John Clark, the vendor, died, and the vendee, William, held and used the slaves for the benefit of the wife and child, until, finding himself involved as a surety upon the official bond of the sheriff, he executed a deed conveying the slaves to the persons specified in the parol trust, reciting therein the trusts attaching to the transfer of title to himself.

The creditors of the plaintiff undertook to pursue the property and subject it to the satisfaction of their claims, which had been reduced to judgment. The court ruled against the plaintiffs, declaring that if the "fraudulent vendee had retained the title to the slaves, they would no doubt have been liable for the payment of his debts, because, as between the parties themselves, the contract being executed, would have been obligatory on them, and irrevocable at the instance of the vendor"; and it is added, that although the transfer to the widow and child could not have been compelled, yet the fraudulent vendee "having done that which in good conscience he should have done, and the title having been vested in, and the possession delivered to, the widow and child of the fraudulent vendor, *before the creditors of the fraudulent vendee had acquired any lien on the property*, the circumstances attending the transaction may be relied upon by them by way of defence to the claim asserted by the creditors."

The same principle is asserted in *Davis* v. *Graves*, 29 Barb., 480, where the purchaser of land caused title to be made to his brother for the purpose of placing it beyond the reach of his creditors, and was afterwards conveyed by the grantee to the purchaser. The creditors of the grantee undertook to follow the land and subject it to their debts. The court refused to give relief, saying, that he, the depositary of the title for the unlawful purpose alleged, "was under no legal obligation to make such conveyance, but he was under a high moral and equitable obligation to do so. The law is not so unjust that it will deny to men the right, while it is in their power to do so, to recognize and fulfill their obligations of honor and good faith. Until the creditors of Daniel Graves (the grantee) *had acquired liens upon this land*, they had no legal or equitable claims in respect to it, higher than, or superior to, those of Jacob Graves."

The same rule is again recognized in the ruling of the commission of appeals in New York, in the briefly reported case of *Cramer* v. *Blood*, 48 N. Y., 684.

There is another aspect in which the case may be looked at. The plaintiffs, through their counsel, were made acquainted with the fraudulent character and purpose of the deed to John R. Ivey, before the instrument under which they claim was executed; and moreover, they have advanced no money upon it, but it was taken as an indemnity against an existing liability. They are, therefore, themselves seeking to enforce an agreement, itself tainted with fraud, as against the creditors of Richard N. Ivey. And what status do they have to ask the aid of a court of equity in foreclosing the mortgage, itself the known offspring of a previous fraudulent mortgage? As the court would not assist John R. in decreeing a sale to support such a transaction as between himself and his father, neither will it help in enforcing the mortgage from the son to the plaintiffs. It will leave both to take and abide by what has been done, but will not come to the relief of either.

But it is said that the reconveyance is itself a fraud upon the

rights of the creditor company, and of the plaintiffs subrogated to its rights. The answer to this is, that the land does not belong to the son; so that, he is unable to restore it to the rightful owner and render it liable to his creditors. A restoration to the owner before liens attach, as the cases cited show, is the execution of an act of moral duty, which, however, a court of equity will not assist in, when both participate in the illegal transaction upon a well settled rule, cannot be a fraud upon the creditors of the fraudulent alienee, nor can they assail the validity of the return of the property.

Without inquiring into the relative rights of the defendants, *inter sese*, we are of opinion that the plaintiffs are not entitled to relief, and their action cannot be maintained. It must be declared there is error, and the action is dismissed.

Error. Dismissed.

R. F. LEWIS v. T. D. McDOWELL and others.

Vendor and Vendee—Equitable Claim—Statute of Limitations and Presumptions—Pleading—Execution Sale—Title—Compensation for loss at judicial sale.

1. Where, under a contract of purchase, the vendor or his assignee seeks, in an action against the vendee or his assignee, to subject the land to the payment of the price, *it was held*, that the action is to enforce an equity in the vendor—not the payment of a debt or money demand—and the statutory bar does not apply. Distinction between statute of limitations and presumptions.

2. In such case, the land is charged with a lien for the unpaid purchase money, and the vendor's equitable claim cannot be defeated by a sale under execution of the vendee's interest and a seven year's possession thereunder by the purchaser.

3. The act of 1879, ch. 217, which requires the plaintiff, in an action to recover a debt for the purchase of land, to allege that the consideration therof is the purchase money, does not apply to this case.

4. Nor is a survey of the land or allegation of demand on defendant to comply with contract, necessary.

5. One who buys at execution sale gets the mere legal title of the defendant in the execution, and is not entitled to be re-imbursed if he suffer loss by reason of a defective title. The right to compensaton for such loss is where the purchaser buys at a judicial sale of property not belonging to the debtor, as provided in Bat. Rev., ch. 44, § 26.

(*Murphy* v. *McNeill*, 82 N. C., 221, cited and approved).

CIVIL ACTION tried at Spring Term, 1882, of BLADEN Superior Court, before *Shipp, J.*

The defendants appealed.

Messrs. Rowland & McLean, for plaintiff.

No counsel for defendants.

SMITH, C. J. David Lewis, on December 21st, 1859, contracted in writing with the defendant, J. W. Lesesne, to sell and convey to him the land described in the complaint at the price of $20 per acre, it being then supposed to contain forty acres, but upon a survey afterwards ascertained to contain an acre more. The vendee paid $600 of the purchase money, and was let into possession.

On February 16th, 1867, Lesesne being largely indebted, conveyed his equitable estate, with other lands, to a trustee, to secure and provide for his debts, among which was one due the defendant, T. D. McDowell.

In March, 1869, the trustee, under the authority given him, sold the said equitable estate to one John A. McDowell, and the latter four months thereafter conveyed the same to the said T. D. McDowell, who at once entered into possession, and has since held and used the land as his own, having, at the time of his purchase, full knowledge of the estate he was acquiring, and of the lien attaching to the land for the unpaid purchase money due the vendor, David Lewis.

On August 5th, 1869, by virtue of an execution issued against

David Lewis, the sheriff, to whom it was directed, after advertisement, sold and conveyed his legal estate in the land to the said T. D. McDowell for the sum of $120.

On August 23d, 1876, David Lewis conveyed all his interest and estate in the land, and assigned the residue of the purchase money unpaid for a valuable consideration to the plaintiff, his son.

These are the material facts found by the court, acting by consent instead of a jury, and on which the plaintiff demands a sale of the land for the satisfaction of the said debt.

There are several objections taken to the relief asked, which His Honor, in stating his conclusions of law, proceeds to notice and remove. While there are no specific assignments of error in form, we suppose the appeal was intended to bring up and present for examination the several rulings upon the sufficiency of these several defences to the action, and they will be accordingly considered. These defences are as follows:

1. The money demand of the plaintiff is barred by the statute of limitations.

2. The possession of the defendant, McDowell, under the sheriff's deed for more than seven years, perfects his title to the land and discharges his trust.

3. No deed is averred in the complaint to have been tendered, nor was any tendered before the bringing of the suit.

4. No survey or allegation of such, and no demand made on the defendant that he comply with the vendor's contract.

5. It is insisted further, that the sum bid and paid for the legal title at the sheriff's sale, and which has *pro tanto* paid a debt of the vendor, ought to be deducted from the remaining purchase money.

I. We concur with the court that this is not an action to enforce payment of a debt, but to enforce an equity in the vendor to subject the land to the payment of part of the price. Had the legal title remained in the vendor, as his security, it is plain there would be no statutory bar, and the owner of the equitable could only obtain the legal estate by discharging the debt.

The plaintiff's equity is not prejudiced by the defendant's acquirment of the naked legal title by a forced sale under process. *Murphy* v. *McNeill*, 82 N. C., 221.

It is true if the debt, separately existing, has been discharged, or is not recoverable from lapse of time, the relief could not be obtained, since the purpose of the mortgage or retained title is only a security for it. But the debt is an equity adhering to the land, unbroken by successive conveyances, at least, if the party has notice, and if subject to any provisions of the statute of limitations, would fall under that of Revised Code, ch. 65, § 19, which raises a presumption of an abandonment of the right of redemption of mortgages and other equitable interests. This presumption does not arise, since, leaving out the time during which the statute was suspended, ten years had not elapsed when the suit was instituted.

II. We are unable to see the force of the objection or its pertinency, resting upon an occupancy of the land for seven years, under the sheriff's deed, before the suit was begun. The legal title was put in the defendant by that conveyance, and it is not rendered more perfect by lapse of time. It is held by him, charged with a lien for the unpaid purchase money, and his possession cannot be adversary to this equitable claim. Besides, the defendant was let in possession under his purchase of the equitable estate, in this respect succeeding to that of the original vendee, and these relations are not changed, from a permissive to a hostile occupation, by the mere act of taking a deed for the legal title.

III. The provisions of the act of 1879, ch. 217, which requires the complaint in an action to recover a debt contracted in the purchase of land to contain an averment to this effect, has no application to the present case. The title is already in the defendant, and the tender of a deed from the plaintiff, who had none to convey, would be a useless and unmeaning act.

IV. The want of a previous survey and allegation of demand cannot be necessary, when the defendant vigorously resists the

recovery or any relief in the premises. This dispenses with the averment if it were otherwise necessary. But this is in the nature of a bill in equity under the former system, and if the suit were unnecessary it would only involve a question of costs. But it is necessary, and the plaintiff's claim denied and opposed.

V. The last exception is to the refusal of the court to recognize the plaintiff's claim to have applied the sum paid to the sheriff, in reduction of the purchase money.

This exception must be overruled, for whatever advantage may have been expected by the defendant in acquiring what he knew was a mere legal title, and how little benefit has accrued to him thereby, he voluntarily chose to give that sum for what the sheriff was selling, and got what he bought. It does not fall within the operation of the act which gives the purchaser, at a judicial sale of property not belonging to the debtor and which is lost, a right to seek compensation for such loss from the debtor. Bat. Rev., ch. 44, § 26. The defendant obtains what he bought and pays the amount of his bid therefor. He has consequently no claim for re-imbursement on his debtor out of the fund now sought to be recovered, or other of his property.

We must, therefore, declare there is no error in the record, and affirm the several rulings of the court. Judgment would be entered here, but as further proceedings in the cause become necessary, which can be more conveniently conducted in the superior court, we remand the cause.

No error. Affirmed.

ISAAC C. WELLBORN v. J. B. SIMONTON.

Reference—Vendor and Vendee—Rents.

1. A referee's estimate of the value of board and lodging will not be disturbed, where there is no agreement as to the price.
2. A vendee of land let into possession, or a mortgagor who remains in possession, is entitled to rents in lieu of interest.

(*Pearsall* v. *Mayers*, 64 N. C., 549, cited and approved).

EJECTMENT tried at Spring Term, 1882, of WILKES Superior Court, before *Avery, J.*

From the ruling and judgment of the court below, the defendant appealed.

Mr. R. Z. Linney, for plaintiff.
Mr. L. L. Witherspoon, for defendant.

SMITH, C. J. The plaintiff, on the 14th day of October, 1876, entered into a written contract with the defendant to sell to him "one-half interest (limited to him and his heirs, being the same title as limited to me) in the land" described in the complaint, and to convey the same on his paying to one A. W. Finley four hundred dollars, and interest thereon at eight per cent. from the 1st day of January preceding, to be applied to a note of $600, bearing a similar rate of interest, executed by the plaintiff to the said Finley in the year 1875, and secured, or attempted to be secured, by a mortgage of the same land.

The defendant, in his answer to the plaintiff's complaint, and as a defence to the action to recover the premises, sets up this executory agreement, alleging his payment in money and otherwise of large sums—the inability of the plaintiff to convey a good title, or any greater estate than for the life of one M. M. Oglesby—his own readiness to comply with his engagement—and asks for a rescission of the contract, the repayment of the

sums advanced, with interest, and, if necessary, a sale of the premises, for their satifaction.

The plaintiff, in his replication, avers that he has title, and can convey an estate in fee to the moiety of the land sold, but expresses his willingness to rescind the contract, and to that end asks a reference, in order that an account may be taken.

An order was accordingly entered, by consent, of reference "to J. T. Finley, to take and state an account" between them.

At spring term, 1882, the referee made his report, submitting an account with the evidence taken bearing upon it, from which it appears there is due from the defendant to the plaintiff the sum of twelve dollars and seventy eight cents. The defendant files several exceptions to the report, which, in a condensed form, are as follows:

1. To the allowance of eight instead of ten dollars per month in the charge for board, and two dollars and a half additional for lodging and fuel.

2. To the charging the defendant with full rents for the premises during his occupancy under the contract of purchase, while he was ready and prepared to pay the same.

These two embody the substance of the five exceptions filed, which were overruled by the court.

I. The referee and presiding judge concur in their estimate of the value of the board furnished by the defendant, and we see no sufficient reason for disturbing the allowance. It may be very low, but is in advance of the price fixed by the parties for the year 1876, which was five dollars per month. The referee, with opportunities superior to those possessed by a reviewing court, to ascertain what is a reasonable compensation in the absence of a specific agreement as to the price, states that his allowance is the result of weighing and reconciling the testimony delivered before him; and an examination of that evidence does not authorize us to increase the sum fixed upon.

II. The second exception must be sustained, so far as the defendant is charged with half rent of the premises during the

period of his occupation as vendee. The use of the one-half was his own under the contract, and the interest on the unpaid purchase money belonged to the plaintiff in lieu of it. There was no contract, express or implied, that the vendee in possession should pay rent to the vendor, and its rescission cannot change the relations between the parties as they then subsisted, so as to render the vendee liable for the value of the use and occupation.

"When a mortgagor remains in possession, or a *vendee is let into possession*," remarks PEARSON, C. J., "*he is entitled to the rents and profits in lieu of interest.* A mortgagee or vendor who takes possession is entitled to receive rents and profits, but will be required, in taking an account of the mortgage money, or the purchase money, to account for rents and profits, or for use and occupation." *Pearsall* v. *Mayers*, 64 N. C., 549. The account must be reformed upon this basis.

The appellant insists he has a right to a decree for specific performance, inasmuch as the plaintiff says he can make a good title, and the defendant asked for a rescission, on the ground that he was not able to make such a conveyance.

This point should have been made and a reference asked, when the pleadings were all in, for an inquiry as to the plaintiff's title, or the submission of an issue to the jury. Neither was asked, and on the contrary, as an accepted and agreed rescission, a consent reference was ordered, to ascertain the accounts between the parties upon that basis. It is too late now for the defendant to raise that question, and he must abide the consequences of his own concurrence in abrogating the contract.

There is error in the ruling by which the defendant is charged with rents upon his own moiety of the land, and the account must be corrected accordingly. In other respects the rulings are affirmed.

Error. Judgment accordingly.

J. J. THOMPSON v. DAVID JUSTICE.

Mortgage—Estoppel—Contract of Purchase—Equity—Officer—Proof of Signature.

1. Vendee, under a contract of purchase and bond for title, was let into possession of land and assigned his interest to B, who subsequently mortgaged the same to the plaintiff; the plaintiff foreclosed and brought suit against the mortgagor for the possession, when the original vendor came in as a party defendant, claiming title; *Held*, (1) That the mortgagor is estopped to deny the title of the plaintiff mortgagee. (2) The plaintiff has an equitable right to a conveyance of the legal title upon payment of the balance due to the vendor.
2. It is competent to prove the handwriting and signature of a register of deeds to a certificate of registration, as *prima facie* evidence of his official character.
3. One acting in an official capacity is presumed to have been duly appointed to the office.

EJECTMENT tried at Spring Term, 1883, of DURHAM Superior Court, before *Gilmer, J.*

This action was originally brought only against the defendant, Amanda Bumpass, who was in possession of the land in controversy, but at fall term, 1882, the defendant, Justice, was allowed, upon his affidavit, to come in and defend the same.

The plaintiff, in support of his title, offered in evidence two mortgages on the land, executed to him by Henry Bumpass, now deceased, and his wife, the said Amanda. These deeds had been registered in the county of Orange, before the division of that county and the establishment of Durham county, and upon the court's allowing the signature of the register of deeds for Orange county to the certificate of registration to be proved, the defendant excepted.

The plaintiff further offered testimony to the effect that the land was sold by him under the power given in the mortgage deeds, and that Joseph Batchelor bid it off and then conveyed

to him; and contended that under this state of facts, the defendant, Amanda, was estopped to deny his title.

The defendant, Amanda, contended that the deeds were fraudulent—their execution by her having been obtained by the false and fraudulent representations of the plaintiff, who took the deeds for the benefit of her said husband.

The defendant, Justice, set up the defence that he was the legal owner of the land; that in 1875, having the legal title, he contracted to sell the land to one Kimball, to whom he gave a bond for title; and that there is still due him fifteen dollars of the purchase money. Kimball sold his interest to said Henry Bumpass.

Plaintiff offered to pay the balance of the purchase money due by Kimball (but defendant refused to receive it), and he avers that he is still willing and ready to pay the same.

The court submitted the following issues to the jury:

1. Were the mortgages under which the plaintiff claims fraudulent? Ans.—No.

2. Were they executed to plaintiff by Bumpass and wife to hold for the benefit of Bumpass? Ans.—No.

3. What amount of purchase money is still due to Justice, under his contract with Kimball? Ans.—$15, with interest.

His Honor thereupon rendered the following judgment: That plaintiff is entitled to recover possession of the land from Amanda Bumpass, and that a writ issue therefor, and it appearing that the defendant, Justice, has not been paid all the purchase money for which he sold the land to Kimball, but that $15, with interest, is still due; it is therefore ordered that unless said sum is paid by plaintiff within sixty days, I. R. Strayhorn, as commissioner of this court, shall sell the land, after due advertisement—one-half cash, and the balance at six months, with interest from day of sale—pay said debt to Justice, and the costs of action, including allowance to the commissioner, and the surplus, if any, to the plaintiff. From this judgment the defendant, Justice, appealed.

Mr. J. W. Graham, for plaintiff.
Mr. W. W. Fuller, for defendant.

ASHE, J. We find no error in the record. The defendant, Amanda, is estopped, by the deeds of mortgage which she executed jointly with her husband, to deny the title of the plaintiff, and he had the right to recover the possession from her.

Justice, who was permitted to come in and make himself a party defendant, claims that he is the legal owner of the land; that he sold it to Kimball, and gave him a bond for title when the purchase money should be paid, and Kimball sold his interest to Bumpass, and Bumpass and wife transferred their interest by mortgage to the plaintiff, and he prays that he may be declared sole owner of the land.

The defendant, Justice, under either the present or former system of procedure, might have recovered possession of the land in an action brought for that purpose; and, under the former system, the defence against such an action was purely equitable, and Thompson would have been driven into a court of equity to assert his defence, when, after the determination of the action of ejectment, the writ of possession would have been stayed until his equitable defence could be passed on. But under the present system, where the distinctions of actions of law and suits in equity are abolished, if sued for the possession of the land, he might set up his equitable defence to the action—that Justice was bound by his contract to make him a title when the purchase money was paid, and that he was ready to make the payment.

The plaintiff has a clear legal right against Bumpass, and an equitable right against Justice. If the latter had not made himself a party defendant, the plaintiff would have had the unquestionable right to recover the land from Amanda Bumpass, and Justice would have either to have brought an action for specific performance and have the land sold for the payment of the balance due him, or resort to an action to recover the possession,

when the plaintiff, Thompson, would have had the right to set up his equitable defence. But by making himself a party, it is competent for the court to consider and adjust all the rights of the parties, both legal and equitable, which are properly presented by the pleadings, and render such judgment as will determine the controversy between them, and thereby prevent a multiplicity of action which it is the policy of the present system to avoid.

As to the exception taken to the ruling of the judge in regard to the admission of proof of the handwriting of the register of deeds for Orange county, it cannot be sustained. There is no other law in this state prescribed for the authentication of the certificates of registers in the state. It is competent to prove their handwriting and their signatures to certificates of registration, as *prima facie* evidence of their official character. The fact that a person has acted in an official capacity is presumptive evidence of his due appointment to the office, because it cannot be supposed that any man would venture to intrude himself into a public situation which he was not authorized to fill. Taylor on Evidence, § 139.

No error. Affirmed.

G. W. McCRACKEN v. J. M. McCRACKEN.

Parol contract of Purchase, damages not recoverable for breach of—Respective rights of Parties.

1. An action for damages for the non-performance of a parol contract for the purchase of land cannot be sustained.
2. A vendee under such a contract, who makes improvement upon the land, cannot maintain an action for their value against the vendor, provided the latter makes no use of them, and is willing that they may be removed.

All that the court can do, in such case, is to see that the vendor shall derive no unconscionable advantage from his manner of dealing with the vendee.

(Chief-Justice Smith dissenting.)

(*Chambers* v. *Massey*, 7 Ired. Eq., 286; *Dunn* v. *Moore*, 3 Ired. Eq., 364; *Sain* v. *Dulin*, 6 Jones' Eq., 195; *Carter* v. *Page*, 4 Ired., 424; *Bridgers* v. *Purcell*, 1 Dev. & Bat., 492; *Albea* v. *Griffin*, 2 Dev. & Bat. Eq., 9, cited and commented on).

Civil Action tried at Fall Term, 1882, of Haywood Superior Court, before *Shepherd, J.*

The court here considered only one of the many exceptions taken for the defendant, and the facts necessary to present it are as follows:

In his complaint as originally drawn and first amended, the plaintiff alleges that in 1872 the defendant was the owner of a tract of land situate in Haywood county and on Crabtree creek, whereon there was a valuable mill-site and convenient water-power, which he was anxious to have improved; that with this view he made certain propositions to the plaintiff, which, after consideration, were accepted by him, and thereupon the two concluded a parol agreement to the effect that the plaintiff should erect a mill upon the premises and dig a race, and in consideration of his so doing the defendant should convey to him the said mill-seat, the race privilege, and a sufficient lot of ground for a log-way about the saw-mill; that in pursuance of said agreement the plaintiff proceeded to erect, and did erect both grist and saw-mills at the place, and dug the race as agreed on, and continued to use and occupy the same from that time up to 1879, when he had written notice given him by the defendant, requiring him to remove his mills and quit the place; that in his conduct in the matter the defendant had been actuated by a purpose to overreach and defraud the plaintiff, and had caused him to sustain a loss of fully one thousand dollars.

The prayer of the complaint is, that the defendant may be required to convey the property and its appurtenances to the plaintiff, according to the terms of the agreement; or if not, that

the plaintiff recover of him the sum of one thousand dollars for the losses sustained.

By his answer the defendant denies that there was ever any agreement or contract between the parties in relation to the land, but that on the contrary the plaintiff entered upon it in his own wrong and built the mills and dug the race without authority, and without any sort of understanding with the defendant that he was to have the title; that after having enjoyed the use of the premises for several years without paying or offering to pay rent for the same, the plaintiff proposed to buy it of the defendant and offered fifty dollars therefor, which the latter declined to accept because he considered it far below its real value, and that this offer is the only proposition that ever passed between the parties looking to a sale by the one and a purchase by the other of the property; that finding that the digging of the race and the flow of water through it was productive of great damage to his adjoining lands, under cultivation, the defendant gave the plaintiff notice in 1879 to remove his mills and machinery from his premises, and this he was still willing he should do, and asks the court to require him to do. He also alleges that he has been endamaged by the race and by the use and occupation of his lands to the amount of one thousand dollars, for which he asks judgment against the plaintiff.

At the trial, the plaintiff offered evidence to establish the parol agreement between the defendant and himself, as set out in his complaint, and that in pursuance thereof he had entered upon the land, built the mill, and dug the race with the defendant's knowledge and consent. He also offered the evidence with a view to show that the defendant had given the plaintiff a license to enter and occupy the premises, and that the effect of such license was to induce him to expend his money in building the mill and cutting the race.

This evidence was objected to by the defendant but admitted by the court, not (as is stated in the case) for the purpose of proving a contract by parol for the conveyance of land or any

interest therein, but to show how the plaintiff had been induced to enter upon and improve the defendant's land; and in order to make the proofs and allegations correspond, the court gave the plaintiff leave to amend his complaint, so as to charge that his entry upon the land, the digging of the race, and building the mills, were all done under a license from the defendant, and that afterwards he had given the plaintiff notice to remove the mills and machinery from the land, and forbidden him any longer to use and occupy the same until removed.

Under the complaint, so amended, issues were submitted and responded to as follows:

1. Were the improvements put upon the land with the knowledge and permission of the defendant? Yes.

2. Was the plaintiff notified by defendant to quit the premises, and did he, in consequence of such notice, quit the same before bringing his action? Yes.

3. What is the value of the permanent improvements which the plaintiff put upon the land? $150.

After judgment against him according to the verdict, the defendant appealed.

Mr. J. H. Merrimon, for plaintiff.
Mr. G. A. Shuford, for defendant.

Ruffin, J. In consideration of the decisions made in *Chambers* v. *Massey*, 7 Ired. Eq., 286; *Dunn* v. *Moore*, 3 Ired. Eq., 364; and *Sain* v. *Dulin*, 6 Jones' Eq., 195, it may well be doubted whether the court can grant any relief, even so far as to give the purchaser compensation for his improvements, under a parol contract for the purchase of land, the terms of which are denied or disputed by the defendant in his answer. These cases all go to the length of saying, that if, in an action brought to enforce the specific performance of such a contract, or in the alternative for compensation for improvements put upon the land, the answer should deny that there was any contract, or

allege that its terms differed from those set out in the complaint, then the court could grant neither relief, because the statute forbids its going into proof to establish for any purpose whatsoever, a contract variant from the one admitted in the answer; and if upon that the plaintiff could get no relief, he could not get it at all.

These cases seem to have been well considered, and much pains taken in them to make known their reasons and to show wherein they differed from other decisions (and it is not to be denied that there are others) which seemed to be opposed to them. It would, therefore, require a most convincing argument to induce me, speaking for myself alone, to depart from principles so maturely considered and so clearly enunciated, and especially as they seem to be in strict keeping with the wise policy of the statute of frauds, in that, they close the door upon temptations to commit perjuries, and the assertion of feigned titles to property. It is not necessary, however, that we should now go to the full length of those decisions, as we conceive a much less stringent rule, and one sanctioned by all the authorities, is sufficient to preclude this plaintiff from the recovery he is seeking to make.

In *Albea* v. *Griffin*, 2 Dev. & Bat. Eq., 9, which is so often referred to as the leading case on the subject, the right of a purchaser under a parol contract to have compensation for improvements, made under an honest expectation that the land would be his, was put expressly upon the ground that it would be against conscience to allow the owner under such circumstances to acquire and enjoy the fruits of another's labor, or the expenditure of another's money, and thus enrich himself to the injury of that other. But neither in that case nor in any other in which its principles have been adopted—and there are many such—is there even a suggestion to be found, that an action can be sustained in any form, or in any court, whether at law or in equity, for damages for the non-performance of such a contract; and that is simply what this action is, nothing more nor less. To permit it

to be done, would be for the courts to act in the very teeth of the statute, in defiance of the declared will of the legislature.

Wherein could consist the difference between a direct enforcement of the contract, in such a case, and the court's saying to the owner, we cannot compel you to part with your property, but should you undertake to exercise ownership over it, we will mulct you with damages? The most they can do, and all they have ever undertaken to do, is to say to him that if he repudiates the contract he must be content with the taking back what was his own, and at its own intrinsic value, unenhanced at the cost or by the labor of another.

But what sort of connection is there between that principle and this case, in which the defendant is not only content with being restored to what was his own, but invites the plaintiff to take what is his (buildings, machinery and all), and craves the aid of the court in compelling him to do so.

If we consider the contract between the parties as a *license* given to the plaintiff to enter upon the land, and erect and enjoy the improvements, we cannot perceive that it in the least serves to help his case. If purely a license, it excused, it is true, his entry upon the land which would otherwise have been a trespass; but it was still revocable, and its continuance entirely dependent upon the will of the owner. If intended to pass a more permanent and continuing right in the land, whereby the authority or estate of the owner could be in the least impaired, it was then not only necessary to be evidenced by writing, but could only be made effectual by *deed*. In Hilliard on Vendors, 124, it is said that a license which grants an estate, however short, requires a deed; and in 3 Kent, 352, the doctrine is thus stated: "A claim for an easement must be founded upon a grant or upon a presumption which supposes one, for it is a permanent interest in another's land, with a right to enter and enjoy the same"; and to the same effect are the decisions in this court in *Bridgers* v. *Purcell*, 1 Dev. & Bat., 492, and *Carter* v. *Page*, 4 Ired., 424.

In any point of view that can be taken of the case, this court thinks the plaintiff must fail in his action.

Having made a contract such as the law discourages from considerations of public convenience, he must abide the consequences; and as the defendant disclaims a purpose to appropriate what is his (the plaintiff's), he must be content with getting that back without compensation for any loss he may have sustained.

The judgment of the court below is, therefore, declared to be erroneous, and the same is reversed, and judgment will be entered here that the defendant will go without day.

Smith, C. *J., dissenting.* While concurring in the disposition made of the appeal, some of the reasons assigned in the opinion for the judgment rendered are so much in opposition to my own convictions and impressions as to what the law ought to be, and under our adjudications, is, that I feel constrained to give utterance to my own views on the subject, lest my silence should be construed into an approval.

The proposition enunciated is, that in a bill for the specific performance of an unwritten contract for the sale of land, resisted under the act of 1819 (Bat. Rev., ch. 50, § 10), not only will not performance be decreed, but the action will be dismissed and no compensation allowed for improvements, unless the existence and terms of the contract, as set out in the bill, are admitted in the answer. If on the other hand the admission is made and the aid of the statute claimed at the same time, an account will be ordered and compensation allowed for the increased value imparted to the land, the subject matter of the agreement, by improvements put upon it by the vendee in good faith, and before notice of the vendor's intention to repudiate it; and this, upon the ground that no parol evidence can be heard to establish the agreement. Thus, by refusing to acknowledge the contract or varying its provisions, the defendant is enabled to escape the obligation of accounting for the increase in value

of the property, produced by the labor and expenditure of the vendee, which his own conduct has invited, and to retain the results free from responsibility to any one. The injustice and wrong, thus in the power of the vendor to perpetrate upon the confidence reposed in his fidelity to an engagement, resting for support on his integrity and good faith alone, would seem to be a sufficient refutation of a doctrine followed by such possible consequences; besides which it invites the defendant, under the strong incentive of interest, to make the denial when compelled to answer the allegation, and commit the fraud and perjury which it was one of the chief objects of the enactment to suppress.

In my own opinion, and upon an examination of the authorities in our own state, this is not a correct statement of the rule which prevailed in the separate courts of equity under the former system, nor ought to be upheld and acted on in a single tribunal invested with the functions and powers heretofore exercised in a divided jurisdiction.

The courts in England and many of the states hold, that when a parol contract has been in part performed in some substantial particular and accepted by the vendee, as in case of betterments put upon land, so that full redress could not be had, after repudiation, by a suit at law, it takes the case out of the statute, and performance will be enforced; and this rule is adopted because, in the language of Chief-Justice Story, "otherwise one party would be enabled to practice a fraud upon the other." Story Eq. Jur., § 759. We disown the doctrine of part performance, and concede the absolute nullity of the contract at the election of the party to be charged for all purposes, and refuse to recognize it as having any force unless put in writing; but while not decreeing execution, we, for the same reason, will not allow a defendant under such circumstances to appropriate to his own use the fruits of another's labor and expenditure, induced by his holding out the expectation to the person making them, that he was

to have the property improved on payment without accountability therefor.

It may be said that it was the vendee's own folly to rely on an oral promise which he knew could not be enforced, and perhaps it was folly in him to depend upon the personal integrity of the vendor, but it would be a gross and inexcusable fraud to permit the latter to take advantage of misplaced confidence, and secure to himself the fruits of another's outlay in money and work, without making any compensation.

The cases relied on in the opinion do seem to refuse all relief, where the defendant denies, and the plaintiff would have to resort to parol proof of, the contract; and they can only be reconciled with numerous others looking in contrary direction by interpreting the words of the court, as having reference to the *obligation of the contract*, and intended to charge the defendant upon it as such. In this sense the rulings are consistent and free from difficulty. But none of them controvert the plaintiff's right to recover, in a court of law, whatever money may have been paid in furtherance of the contract on his own part, and to do this he is required to show the circumstances under which the moneys were paid, among them the most material being the parol contract and the defendant's repudiation of it, as constituting his cause of action. But this, as well as the claim for improvements, must now be entertained in the same court, and as incidental to and part of a suit for specific performance, when the latter redress is inadmissible. The evidence is not offered to show a contract, possessing any legal force, as this would be in direct disregard of the statute, for the plaintiff's equity springs out of the nullity of the parol promise, which the defendant may set aside or abide by, and, if he does set it aside, requires him to restore what he received under it while he recognized its binding force.

I see no reason for excluding the claim for improvements.

I find it difficult to understand how the mere acknowledgment of an unwritten and void contract, in opposition to the

statute, can fix upon the defendant a liability which full proof after denial cannot, or how any effect can be ascribed to it, when the statute is set up; for the acknowledgment is only of a void contract, and can impart no legal efficacy to it. It is not the less invalid because of such admission.

In this connection, a brief reference to former adjudications on the subject becomes necessary.

In *Ellis* v. *Ellis* it was first held that the vendor should perform his parol contract. 1 Dev. Eq., 180. Upon the rehearing the decree was reversed "so far as it ordered the execution of the contract." *Ibid*, 341. It was again before the court upon a motion for further directions, and it was decided that inasmuch as full redress was not attainable by an action at law, the plaintiff's "plain equity" is to have a suit on a bond, transferred in part payment, instituted by defendant, stayed, a restoration of the money less the value of the mesne profits recovered by defendant, and an entry of satisfaction of his judgment at law against the plaintiff. A decree to this effect was entered. *Ibid*, 398. In this case the answer set up the defence under the act of 1819.

In *Baker* v. *Carson*, 1 Dev. & Bat. Eq., 381, the defendant, having a life estate in the land with remainder in fee to her two daughters, one of whom and her husband were the plaintiffs, to induce them to settle near her, said to him, the land was in a great measure uncleared, and that upon a division between the remaindermen, and the plaintiffs moving upon the share assigned to them and settling there, she would release to the *feme* plaintiff her life estate therein. This was done, and the land greatly improved during the plaintiff's several years residence thereon, when, upon disagreement, the defendant sued to recover possession of the premises. The defendant pleaded the act of 1819, avoiding parol contracts for the sale of land.

Delivering the opinion, the learned Chief-Justice says: "So far as the bill seeks this relief (specific performance) it must be dismissed. The alleged agreement is by parol, and the defendant insists on the act of 1819, which declares all such parol

agreements void in law and in equity. But the bill asks for relief of a different kind. It prays that the defendant may be enjoined from turning the plaintiff, John, out of possession, unless she will make him a reasonable allowance for the valuable improvements he has put upon the land. This claim is not founded upon the supposed existence of any *contract* of which it seeks execution, or for the breach of which it asks compensation or damages. It is an appeal to the court to *prevent fraud.*" In concluding the opinion he adds: "To enable us to ascertain what is just between the parties, let the clerk and master of Pitt inquire and report the *additional value conferred on the defendant's life estate in this land by means of the plaintiff's labor and expenditures thereon*" (the italics are our own), and also the reasonable value of the use of the land since the 1st day of January, 1831, when possession was required to be surrendered.

In this ruling GASTON, J., concurs, but DANIEL, J., dissents, upon the ground that full compensation can be obtained in an action at law.

In *Albea* v. *Griffin*, 2 Dev. & Bat. Eq., 9, the defendant's ancestor contracted by parol to convey the land to the plaintiff for goods which were partly delivered, and put the defendant, after a survey, in possession. The plaintiff erected a house on the premises, in raising which the vendor gave him assistance. The action was against the defendants, the heirs-at-law, for a specific performance, and the defence was that the agreement was not in writing. GASTON, J., admitting the statutory obstruction in the way of an enforcement of the obligation, says: "But we are nevertheless of opinion that the plaintiff *has an equity which entitles him to relief, and that parol evidence is admissible for the purpose of showing that equity.* The plaintiff's labor and money have been expended in improving property, which the ancestor of the defendants encouraged him to expect should become his own, and by the act of God, or by the caprice of the defendants, this expectation has been frustrated. The consequence is a loss to him and a gain to them. *It is against conscience that they*

should be enriched by gains thus acquired to his injury. If they repudiate the contract, which they have a right to do, they must not take the improved property from the plaintiff, *without compensation for the additional value which these improvements have conferred upon the property.*" A reference was accordingly ordered to ascertain the additional value imparted by the improvements, and for an account.

In *Smith* v. *Smith*, 1 Ired. Eq., 83, a written memorandum of the agreement was alleged but not proved, and a demand for compensation was refused, because not warranted by the case in the pleadings, DANIEL, J., remarking: "If the plaintiff can make any case at law, either for damages or for compensation, this decree will not stand in his way."

In *Dunn* v. *Moore*, 3 Ired. Eq., 364, it is decided that when the contract is denied and the statute insisted on, there can be no relief; but that if the defendant had admitted the contract, and that he had put the plaintiff in possession, he would be entitled to relief, "not that this court could in a case of this kind give the plaintiff anything by the way of damages for *the violation of a contract,* but because the defendant, after making the contract and putting the plaintiff into possession, ought not to be allowed to put him out without returning the money he had received and compensating him for his improvements."

It will be observed that the equity arises out of a contract which has induced the outlay and expenditure, and its enforcement is made to depend upon the defendant's admission of the fact, and will be denied, if to be proved in any other way—thus placing the remedy entirely in the hands of the defendant to allow or to refuse, and yet the statute is as effectual a barrier where the contract is admitted and the statute relied on, as when the contract is denied.

In *Chambers* v. *Massey*, 7 Ired. Eq., 286, a parol contract of sale at the price stated, the letting the plaintiff into possession, and the receiving in part payment a mare valued at $50, was admitted in the answer as charged in the bill, but the other terms

of the agreement set out were denied, and the statute was relied on. The specific performance was refused and would have been the alternative relief, if there had been full redress in a court of law; but as a part of the consideration paid was a claim against one John N. McGee, which the defendant had converted into a bond of McGee payable to himself, RUFFIN, C. J., declared that a court of equity would take cognizance of the cause, and that the plaintiff's equity was to have the bond, and be reimbursed the value of the mare received by the defendant towards the purchase money, "and *also the value of the permanent improvements made by him on the premises*, before filing the bill, or before he was informed, at any time prior to the filing of the bill, that the defendant would not convey the premises to him under the contract."

The case of *Thomas* v. *Kyles*, 1 Jones' Eq., 302, was to set up a deed of gift for land, which the donor had got into his possession and destroyed, and, it would seem from an imperfect statement, for a conveyance of a small piece of land besides. BATTLE, J., in relation to this tract of five acres, says the contract for its purchase "*was never reduced to writing and is not admitted in the answer.* It cannot, therefore, be specifically enforced, even though partly executed, but the *plaintiff is entitled to an account for the substantial improvements put upon the land by her father.*"

In *Love* v. *Neilson*, *Ibid*, 339, the defence under the act of 1819, that the contract was not in writing, was set up in a plea in bar, and while denying a decree of conveyance of the land, the court say, BATTLE, J., delivering the opinion: "But upon the authority of *Baker* v. *Carson*, 1 Dev. & Bat. Eq., 381, and *Albea* v. *Griffin*, 2 Dev. & Bat. Eq., 9, we think that the plaintiff is entitled in this court to be paid for the improvements which, under his contract with the defendant, he, by his work and labor, put upon the defendant's land. As to obtain this, he is entitled to an answer from the defendant, and, as the answer

cannot be filed in this court, the cause must be removed to the court below for that purpose."

In *Murdock* v. *Anderson*, 4 Jones' Eq., 77, the plaintiff was left to pursue his remedy at law for the money paid, and in *Capps* v. *Holt*, 5 Jones' Eq., 153, the jurisdiction was entertained because the defendant in his answer offered "to account with the plaintiff fairly."

In *Hinton* v. *Fort*, 5 Jones' Eq., 251, Pearson, C. J., uses this language, the statute of frauds being relied on: "As the contract was not reduced to writing, the plaintiff is not entitled to specific performance, but as the repairs and improvements were made with the knowledge and concurrence of the defendant, he cannot in conscience take the benefit and refuse to make a proper allowance for the expenditure, unless the plaintiff has violated and refused to abide by and perform some essential part of the contract," &c.

The case most strong against the granting of any relief, unless the contract is admitted by the defendant, is that of *Sain* v. *Dulin*, 6 Jones' Eq., 195, and it must be conceded to be irreconcilable with some of the previous adjudications, two of which are summarily put out of the way in the opinion of Battle, J., who says: "Were the contract, which he (the plaintiff) states, admitted by the defendant, but repudiated because of its being by parol, his claim for compensation on account of the value which he added to the land by his improvements would be clear, has long since been settled by the leading case of *Albea* v. *Griffin*, 2 Dev. & Bat. Eq., 9. But the answer denies the contract as set out in the bill, and alleges one which he avers he was willing to have executed, had he not been prevented from doing so by the misconduct of the plaintiff himself. Under these circumstances, the case of *Dunn* v. *Moore*, 3 Ired. Eq., 364, is a direct authority against the claim of the plaintiff to any relief at all." "If the contract be denied," he continues, "the court cannot grant any relief, because it cannot go into proof of a contract variant from that which is stated in the answer."

So far as relief is sought under the contract, as one possessing any binding force, the conclusion announced is incontrovertible, but I am unable to see upon what ground is shut out an inquiry into the circumstances, of which the contract may be one of the strongest, under which the plaintiff was induced to enter upon land and lay out his money, labor and time in its improvement, and which render it inequitable, if not a fraud, in the vendor to reap the fruits of the outlay made by the plaintiff. *Clancy* v. *Crone,* 2 Dev. Eq., 363.

This adjudication may grow out of a former ruling, to the effect that when the defendant in his answer admits a parol contract, such as was alleged in the bill, a party cannot avail himself of the statute, and that he was bound to answer, not only whether there was any such agreement as charged by the plaintiff in writing, but whether there was such by parol, and its terms. Story Eq. Jur., §§ 756, 758, and numerous cases cited. But it is now well settled that if the defendant should, by his answer, admit the parol contract and insist on the benefit of the statute, he will be fully entitled to it notwithstanding such admission; but if he does not claim the protection of the statute, the contract will be enforced. Story Eq. Pl., § 763. Such is the rule recognized in this state. Will. Eq. Plead., 327.

As then the admission in the answer of a parol agreement, when the protection of the statute is invoked, gives no vitality whatever to it, and it remains void as if it did not exist, so far as any obligation is imposed upon the defendant, it is difficult for me to distinguish in principle the cases where the contract is denied and where it is admitted, as furnishing a just claim to remuneration for improvements made by the vendee.

But I think the fair conclusion to be drawn is, that in both cases, where the contract upon an admission or upon undoubted evidence fully appears, and by this means a party has been induced to enter upon and improve real estate upon a reasonable expectation of becoming its owner when paid for, the vendor, while he may repudiate his contract, must not appropriate the

fruits of the expenditure of another without compensation to him; and this, because a fraud would be thus perpetrated.

The evidence is competent, not to create an obligation, but to uncover and expose a fraud, which would be remediless unless it was allowed. Such, I think, is the general current of the rulings in this state.

Of course, any redress afforded under a divided general system may now be had in the same tribunal and in a single action.

Reluctant to disagree with my Associates of the court upon the proposition which has been discussed, and which was not necessary in deciding the cause, its practical and wide-reaching consequences have induced me to examine the authorities in our own state, and the investigation brings me to the result I have mentioned. Yet I approve the action of the court in its disposition of the cause.

PER CURIAM. Reversed.

H. R. WELBORN v. F. W. SECHRIST and others.

Contract of Purchase—Specific Performance.

In an action for specific performance of a contract for the purchase of land, it is no defence in the vendor to say that he has disabled himself to comply with the same: the vendee is entitled to judgment that the vendor make reasonable efforts to reacquire the title and convey to him.

(*Green* v. *R. R. Co.*, 77 N. C., 95; *Love* v. *Camp*, 6 Ired. Eq., 209; *Swepson* v. *Johnson*, 84 N. C., 449; *Bryson* v. *Peak*, 8 Ired. Eq., 310, cited and approved).

CIVIL ACTION tried at Spring Term, 1882, of GUILFORD Superior Court, before *Graves, J.*

The defendant, F. W. Sechrist, owning a tract of land containing about twenty-one acres, at a sale under execution against

his father, the defendant, Reuben F. Sechrist, made in September, 1879, and conveyed to him by the sheriff of Guilford in the month of August of the year following, entered into a written agreement in these words:

"HIGH POINT, N. C., August 9th, 1880.

Received of H. R. Welborn two dollars, to bind a trade between said Welborn and F. W. Sechrist. I bind myself to make said Welborn a deed to a lot of land 200 feet front and 200 feet back, lying on Jamestown street, adjoining J. B. Richardson on the west and fronting on Jamestown street. I bind myself to make a deed to said lot when said Welborn pays me ninety-eight dollars more.

(Signed) F. W. SECHRIST.

Witness, J. S. Campbell."

When the survey and marking off the lot mentioned in the contract were about to be made, on the next day, in order to the execution of the deed therefor, the vendor stated that his mother, (the defendant, Nancy,) objected to his selling, because the lot was part of the garden, and he wanted the lines so run as to have less front on the street, and with greater depth, so that the area should be the same, and the plaintiff assenting thereto, the survey made gave a front of 169 feet and a depth of 236 feet. While the deed conforming to the survey and change of boundary was being prepared, and in the absence of the plaintiff, who had gone to get the residue of the purchase money, the vendor laid down the amount he had received and declared his purpose not to sign the deed. On the plaintiff's return, and learning what had occurred, he took the deed, presented it for execution, and tendered the sum ($98) yet due. The vendor refused, remarking that his mother was unwilling to sell the lot, unless the entire tract, of which it was part, could also be sold.

The defendants concur in stating in their answers that the vendor bid off the land as agent for his mother, and paid the

purchase money with funds furnished by her out of her separate estate, and that through inadvertence the title was made to him instead of to her, and that this fact was known to the plaintiff at the time of making the contract, and that the vendor had conveyed the land to her as in equity he was bound to do.

This is the substance of the defence to the action of the plaintiff for a specific enforcement of the contract and a conveyance of the land to him.

Upon the trial, the plaintiff, examined on his own behalf, testified that when he purchased the lot, he had no knowledge, nor had ever, of any claim of the said Nancy to the land, or that she had any separate estate, until a few days after, when he learned of the making of the deed to her.

The plaintiff also produced in evidence a mortgage deed for the whole tract made by the vendor to one Bryant, to secure money borrowed of him, which had been satisfied, and a deed from the same to one W. H. Miller for a lot taken from the tract.

The deed tendered described the lot by its changed boundaries, but the complaint demands performance of the written contract as the lot is therein described.

Upon an intimation from the court that taking all that had been shown by the plaintiff to be true, he could not maintain his action, he submitted to a nonsuit and appealed.

Messrs. Scott & Caldwell, for plaintiff.
Messrs. J. N. Staples and *Hinsdale & Devereux*, for defendants.

SMITH, C. J., after stating the facts. We are at a loss to understand upon what ground His Honor ruled that no relief could be obtained, and we infer from the course of argument on the appeal that it was in consequence of the variation by parol of the form and boundaries of the lot, as defined in the written contract. In this view we do not concur. If the vendor, waiving the statute of frauds, had consented to abide by the modified

contract and carry it into execution, the plaintiff would be compelled to accept such performance, because the statute is only available to the party to be charged, and the plaintiff cannot make the objection. This is held in *Green* v. *N. C. R. R. Co.*, 77 N. C., 95.

As, however, the vendor and his associate defendants repudiate the entire contract and deny the plaintiff's right to any conveyance by either boundary, the attempted verbal modification becomes inoperative as against the vendor, and the plaintiff is remitted to his right to claim under the written agreement and according to its terms.

If in truth the defendant, Nancy, did supply the funds to pay for the land, and her son acted in the purchase as her agent and on her behalf, she would have an equity equal if not paramount to that of the plaintiff, and having acquired the legal title could retain the estate, upon the principle that where the conflicting equities are equal the possession of the legal title shall control.

It does not appear, however, that any proof was offered of the alleged prior equity in the mother; and if it did so appear, it must be disregarded, since the ruling is predicated upon the assumed truth of the facts shown by the appellant, and so must be our revision of the correctness of the ruling. There is evidence tending to show that the defendant, Nancy, had entrusted the disposition of the property, if she had any equitable claim thereto, to her son; and knew, without making known any dissent, of the negotiations between the parties that resulted in the making of the contract; or it is at least inferable from the facts that her alleged agent had made two other conveyances, the one, of the whole land as a security for borrowed money, the other, absolute as to a part of it; that her objections were at first to the form of the lot, as interfering with the garden, and then because a portion and not the whole tract had been sold; that the husband, the former owner, when applied to by the plaintiff to buy, referred him to the son, and that the plaintiff visited the house

openly and the son went out with him to look at the premises, seemingly with their knowledge.

Assuming that the conclusion be reached that the contract was entered into with the knowledge and assent of the other defendants, the question arises, can the parties, by such an arrangement transferring the estate from the vendor to his mother, the *feme* defendant, evade and defeat the jurisdiction of the court in the exercise of a clear power to enforce compliance with the contract, or is this authority paralyzed by a resort to this simple contrivance which puts an estate in the wife, to which she has no just claim, in fraud of the rights of others?

There is some difficulty in making a satisfactory solution of the inquiry, existing in the fact that a deed from a married woman must, to convey her estate in land, be the offspring of her own volition, and this must appear in a private examination made by competent authority.

We have not been able to find any adjudication upon the point. It would seem there ought to be some relief against the consequences of such a transaction, by which the equitable estate created by the contract is taken from the vendee and he deprived of his right to have the same. But the kind and measure of relief to be afforded by an application to the equitable jurisdiction of the court, are not necessarily presented in the present case, and we forbear to express an opinion upon the point until it shall directly arise and require a determination. It is sufficient now to say, that the plaintiff has a right to a judgment against the vendor, which shall compel him to make sufficient efforts to undo what he has done, and reacquire, so that he can convey the title in the lot sold to the plaintiff; and it is no defence to the action for him to say he has disabled himself to comply with his contract.

In *Love* v. *Camp*, 6 Ired. Eq., 209, PEARSON, J., uses this language: "If the vendee does not know that the vendor has not the title, there is then no reason why he should not be decreed to perform his agreement, and if he is put to great inconvenience

and expense to enable him to obey the decree, it will be the consequence of his own act, and he will not be allowed to offer such an excuse for not doing justice."

"It is a defence that the vendor is unable to convey the title, for want of it in himself, after reasonable efforts to obtain it." *Swepson* v. *Johnson*, 84 N. C., 449; Fry on Spec. Perf., § 658; Pom. Cont., § 203.

The rule prevails when the vendor, after making his contract, sells to a *bona fide* purchaser without notice. *Swepson* v. *Johnson*, *supra*; *Denton* v. *Stewart*, 1 Cox, 258.

If the conveyance after contract were made to one cognizant of its existence and provisions, and a person, *sui juris*, the reconveyance can be coerced from the purchaser. *Lanety* v. *Mason*, 33 N. Y., 658; *Foss* v. *Haynes*, 31 Maine, 81.

The party is not by such means thrown back upon his action for compensatory damages for a breach of the obligation, but he has a remedy in its specific enforcement.

"While on the one hand," remarks PEARSON, J., "the vendee is not obliged to take compensation in damages, but may insist on having the thing contracted for, so on the other, the vendor is not obliged to make compensation in damages, but may insist on the vendee's taking the thing contracted for." *Bryson* v. *Peak*, 8 Ired. Eq., 310.

We do not undertake to pass upon the plaintiff's remedy against the *feme* defendant, and in what form, if there be any, in case of her refusal to make title, it is to be given; but we simply decide against the ruling that the plaintiff cannot maintain his action at all, in deference to which the nonsuit was suffered. If the facts be as supposed, he has a right to require of the vendor a reasonable effort to reacquire title, though at much expense, and thus put himself in condition to comply with his engagement; and he may have redress in some form against the other defendants if they have participated in the vendor's endeavor to rid himself of his obligation to convey, in fraud of the vendee's right to compel performance, by depositing the title

in a married woman; but we will not undertake to declare or define the extent and kind of such redress as may be open. Possibly upon the next trial the point may not arise.

There is error, and the nonsuit must be set aside and a new trial awarded, and it is so adjudged. Let this be certified.

Error. *Venire de novo.*

G. J. THORNBURG v. R. A. MASTEN.

Contract of Purchase—Description in—Deed.

1. The consideration of a contract to convey land need not be set out in the writing.
2. Where the contract is as follows: "Received of G. T. five hundred dollars on account of the sale of my interest in the 'Lenoir lands,' owned by myself and J. W. T."; *Held*, that the description is sufficient to admit parol evidence to identify the land.

(*Miller* v. *Irvine*, 1 Dev. & Bat., 103; *Ashford* v. *Robinson*, 8 Ired., 114; *Green* v. *Thornton*, 4 Jones, 230; *Kent* v. *Edmonston*, *Ib.*, 529; *Farmer* v. *Batts*, 83 N. C., 387; *Henly* v. *Wilson*, 81 N. C., 405; *Smith* v. *Low*, 2 Ired., 457; *Reddick* v. *Leggett*, 3 Mur., 539, cited and approved.)

CIVIL ACTION tried at Fall Term, 1882, of WILKES Superior Court, before *Gudger, J.*

This action was instituted against the defendant, J. S. Call, and the heirs of William Masten, for a specific performance of a contract to convey land, entered into by the said Masten with the plaintiff, Thornburg.

The defendants, with the exception of Call and Brown, are the heirs-at-law of William Masten.

The facts are, that some time in the year 1863 said Masten contracted to sell to the plaintiff one undivided moiety of a tract of land lying on Fishing creek, in Wilkes county, adjoining the lands of N. Parker, J. W. Transean and A. Winkler, containing,

in all, two hundred and twelve acres (the other moiety being owned by J. W. Transean), giving to the plaintiff the following paper writing: "Received, April 21st, 1863, of George Thornburg, five hundred dollars on account of the sale of my interest in the Lenoir lands, owned by myself and J. W. Transean." (Signed by William Masten.)

By the agreement, Masten was to have the land surveyed, which he pretended to do, but afterwards refused to make the plaintiff a deed for the same, though often requested so to do.

Before his death in 1876, Masten went into bankruptcy and included the land in dispute in his schedule. It was allowed him as his homestead, and his reversionary interest was sold by his assignee and purchased by James Calloway and G. H. Brown, who soon afterwards sold the same to the defendant, Call, who had full knowledge of the fact that Masten had contracted to sell his interest to plaintiff and that the latter had paid five hundred dollars towards the purchase.

The defendant, Brown, answered that he had no interest in the land.

The defendant, Call, among other defences set up in his answer, insisted that the description contained in the receipt set out in the complaint was so indefinite that the court could not know with any degree of certainty the land of which it is asked to decree conveyance.

The case was submitted to the jury upon the issues raised by pleadings, and upon an intimation of His Honor that said receipt was too vague in its description, and was not a sufficient memorandum in writing to entitle the plaintiff to recover, he suffered a nonsuit and appealed.

No counsel for plaintiff.

Mr. L. L. Witherspoon, for defendants.

ASHE, J. The question is, whether there was error in the ruling of His Honor that the receipt for the five hundred dollars

was too vague and uncertain to take the contract out of the operation of the statute of 29 CHARLES II.

We are at a loss to know upon what ground His Honor intimated the opinion that the writing recited in the complaint was insufficient to maintain the action upon it: whether it was upon the ground that the full consideration, agreed to be paid by the plaintiff, was not mentioned in the writing, or because the description of the land was too uncertain. But in either view there was error in the opinion expressed by him.

Although in England it is held that in any contract for the conveyance of land the consideration must be set forth in the agreement, it has been decided otherwise in this state. In *Miller* v. *Irvine*, 1 Dev. & Bat., 103, in which Chief-Justice RUFFIN gave an elaborate opinion reviewing the English and American decisions on the subject, it was held that our act of 1819, copied from the statute of CHARLES II., to make void parol contracts for the sale of lands and slaves, did not require that the consideration of the contract should be set forth in the written memorandum of it. This decision was followed by *Ashford* v. *Robinson*, 8 Ired., 114; *Green* v. *Thornton*, 4 Jones, 230; *Kent* v. *Edmonston*, *Ib.*, 529, and other cases that might be cited to the same effect.

The other point, as to the vagueness and uncertainty in the description of the land, has been equally well settled by the adjudications of this court, notably in *Farmer* v. *Batts*, 83 N. C., 387, and *Henly* v. *Wilson*, 81 N. C., 405, and the numerous decisions cited in each of those cases. In the former, which was an action for the specific performance of a contract, the written memorandum relied upon as evidence of the contract was, as in this case, a receipt as follows: "Received of W. D. Farmer fourteen hundred dollars, in full payment of one tract of land containing one hundred and ninety-three acres, more or less, it being the interest in two shares adjoining the lands of James Barnes, Eli Robbins and others. This 25th of January, 1864." This receipt is very similar in its terms to that in the case before us, with the differ-

ence that, here, the land is more specifically described by giving the name of the land as the "Lenoir land." The name of a place, says Chief-Justice RUFFIN, in *Smith* v. *Low*, 2 Ired., 457, like that of a man, "may and does serve to identify it to the apprehension of more persons than a description by coterminous lands and water courses, and with equal certainty. For example, 'Mount Vernon, the late residence of General Washington,' is better known by that name than by a description of it as situate on the Potomac river and adjoining the lands of A, B, and C."

In *Reddick* v. *Legget*, 3 Mur., 539, it was said by HENDERSON, J.: "If I grant White Acre, which I purchased of J. S., and which descended to me from my father, White Acre will pass, although I purchased it of J. N. and not J. S., and although it descended to me from my mother and not from my father; it is sufficiently identified by its name, and the other descriptions are not sufficient to render it uncertain."

Such particularity in the description of land conveyed or contracted to be conveyed, as will give the court certain and unmistakable information of the land that is meant, is not required, and could rarely even be attained. All that is required is that the land should be described with such certainty that by proof *aliunde* the description may be fitted to the thing. In almost every case, extraneous proof is requisite and admissible to apply the description to the land meant to be conveyed. *Smith* v. *Low*, *supra*.

There is error. A *venire de novo* is awarded.

Error. *Venire de novo.*

A. E. BREAID v. G. A. MUNGER and others.

Contract of Purchase—Deed.

A contract of purchase of land will not be specifically executed, where the memorandum thereof contains the words, "one hundred acres," but fails to describe its boundaries. This imperfect description is a fatal defect, and cannot be aided by parol evidence.

(*Farmer* v. *Batts*, 83 N. C., 387, and cases cited; *Richardson* v. *Godwin*, 6 Jones' Eq., 229; *Mayer* v. *Adrian*, 77 N. C., 83; *Barnes* v. *Teague*, 1 Jones' Eq., 277; *Love* v. *Neilson*, *Ib.*, 339, cited and approved).

CIVIL ACTION tried at Fall Term, 1882, of CAMDEN Superior Court, before *Gilliam, J.*

The plaintiff alleged that the defendants entered into a contract to sell him a certain tract of land in Camden county—describing it in his complaint—and he was thereupon let into possession of the same, and has improved the premises at considerable cost to him. He further alleges that he has paid the purchase money in full, and demanded a deed from the defendants, which they refuse to execute. This action is brought for a specific performance of the contract.

The defendants, among other things not material to the point decided by this court, say that the contract was never reduced to writing, nor was any memorandum thereof signed by them, or either of them, whereby to take the same out of the statute of frauds, and deny many of the allegations in the complaint.

The plaintiff replies and alleges that the contract was reduced to writing, and a memorandum of the same made in words and figures, and set in the opinion here.

The defendants demurred to the replication upon the ground that the facts contained therein are not sufficient in law to support the plaintiff's action. The court sustained the demurrer, and the plaintiff appealed.

Messrs. Grandy & Aydelett, for plaintiff.
Mr. J. W. Griffin, for defendants.

SMITH, C. J. The case made in the pleadings and the point presented by the demurrer to the replication, which embodies and reiterates the allegations contained in the original and the amended complaint, is simply as to the sufficiency of the written memorandum, therein set out, as evidence under the statute of frauds of a binding contract, capable of being enforced against the defendants.

The memorandum is as follows: In settlement with A. E. Breaid, Kipp and Munger owed him $316.30, to be applied to his 100 acres of land and the lot where his home is paid for in full. KIPP and MUNGER,

New Mills, N. C., Per H. D. K.
Sept. 1st, 1878.

Nov. 4th, 1879, in addition to the above he has paid one hundred and seventeen dollars and twenty-five cents, in settlement of his account to date.

(Signed) GEORGE A. MUNGER.

The obvious and manifest imperfection in the writing is its failure to describe and fix the boundaries of the one hundred acres, so that its identity can be ascertained and the conveyance adjudged. It simply declares the balance due upon some settlement between the parties, and their agreement that it shall "be applied to his one hundred acres of land," that is, upon a fair and reasonable interpretation of the words, to a reduction of the indebtedness incurred by the plaintiff in his purchase of land, of that extent, from the subscribing defendants. The subsequent memorandum is no more explicit, and only acknowledges a further payment upon another adjustment of accounts for the same purpose.

The land, the subject matter of the contract, is nowhere described or defined, except in the number of acres embraced, and this defect under the statute cannot be aided by parol evidence.

Without searching for other authorities, that of *Murdock* v. *Anderson*, 4 Jones' Eq., 77, is decisive. There, it is held that this memorandum—"Received of A. C. Murdock, one hundred dollars in tin-ware, and one carry-all at seventy-five dollars, in part payment of one house and lot in the town of Hillsboro, purchased of me by him for the sum of three hundred and fifty dollars" (signed by the defendant), did not fulfil the requirements of the statute, and that the imperfect description of the land was a fatal defect.

There are adjudications elsewhere, some of which are referred to in the opinion in *Farmer* v. *Batts*, 83 N. C., 387, where the subject is fully discussed, to the effect that if it be shown that the vendor owned a single lot in a specified town, such general words of designation, thus explained, would sufficiently designate the land to which the contract relates, as understood between the parties; it is plain that even this liberal construction would not embrace the present case, or admit the location of the one hundred acres mentioned, whose position and boundaries are wholly indefinite, and incapable of being fixed by anything in the writing.

In *Capps* v. *Holt*, 5 Jones' Eq., 153, the land is described as "lying on the north side of the Watery branch, in the county of Johnston, and state of North Carolina, containing one hundred and fifty acres," and the court declares that "the position, thus given, is not definite enough and no decree for a conveyance could be based upon it." See also *Richardson* v. *Godwin*, 6 Jones' Eq., 229, and *Mayer* v. *Adrian*, 77 N. C., 83.

The admissions in the answer of a verbal contract for land, therein sufficiently described, is unavailable in aid of the insufficient description given in the written receipt, inasmuch as the statutory defence is expressly relied on as a bar to the action. If the answer contained an acknowledgment of all the essential elements of a contract, resting in parol, and denied its legal efficacy because not in writing, it could not be enforced; and this

is equally true as to such admission of any of its material facts. *Barnes* v. *Teague*, 1 Jones' Eq., 277.

The demurrer to the replication which seeks to set up and compel the performance of a binding contract must therefore be sustained, and the rulings of the court affirmed.

But while no relief can be obtained on the contract itself, its repudiation by the defendants entitles the plaintiff to a return of the purchase money he may have paid, and remuneration for improvements, lessened by the rents and profits accruing during their occupation. *Love* v. *Neilson*, 1 Jones' Eq., 339.

The action will not, therefore, be dismissed, but if the plaintiff so elects the cause will be retained, and an account ordered to ascertain what may be due him, and to this end a reference directed. The plaintiff will pay the costs of the appeal. Let this be certified to the court below.

No error. Affirmed.

G. P. DOUGHERTY v. J. W. SPRINKLE and wife.

Married Women, contracts of—Equity—Jurisdiction—Pleading.

1. An action against a married woman, upon a promise to pay for work done on premises owned and held as her separate estate, is not cognizable in the court of a justice of the peace. Such court is a common law court, and its jurisdiction does not therefore embrace causes of an equitable nature.

2. At law, she cannot bind herself personally, and hence her contract will not be enforced against her *in personam*, but equity will so far recognize it as to make it bind her separate estate, and will proceed *in rem* against it; such estate, being regarded as a sort of artificial person created by the courts of equity, is the debtor and liable to her engagements.

3. The complaint, in an action upon the contract of a married woman, must

allege that she is possessed of a separate estate, and that the contract is such as the statute renders her competent to make, and that it is for her advantage.

(*Fisher* v. *Webb*, 84 N. C., 44; *Murphy* v .*McNeill*, 82 N. C., 221; *McAdoo* v. *Callum*, 86 N. C., 419; *Lutz* v. *Thompson*, 87 N. C., 334; *Green* v. *Branton*, 1 Dev. Eq., 500; *Pippen* v. *Wesson*, 74 N. C., 437; *Huntley* v. *Whitner*, 77 N. C., 392, cited, commented on and approved.)

CIVIL ACTION tried at January Special Term, 1882, of MECKLENBURG Superior Court, before *Bennett, J.*

Verdict and judgment for plaintiff; appeal by defendants.

Mr. Platt D. Walker, for plaintiff.

Messrs. Jones & Johnston, for defendants.

RUFFIN, J. The single question presented in this appeal is, whether the court of a justice of the peace can entertain an action against a married woman, brought upon a promise to pay for work done upon premises owned and held as her separate property.

In *Fisher* v. *Webb*, 84 N. C., 44, a doubt was expressed as to whether that court had jurisdiction of any cause arising *ex contractu* against a *feme covert;* but as the point did not directly arise in that case, and was not necessarily involved in its decision, it was not intended to conclude it. It was, therefore, fairly open to the plaintiff to be raised, as he has seen fit to do, in the present case.

Further reflection, however, and a more particular examination into the precedents, ancient and modern, serve to confirm us in the impressions we then had, and make it clear to our own minds, at least, that no such jurisdiction can be exercised by the court of a justice of the peace, seeing that, according to all authorities, his is but a common law court, and that his jurisdiction does not embrace causes of a peculiarly equitable nature. See *Fisher* v. *Webb*, *supra;* *Murphy* v. *McNeill*, 82 N. C., 221; *McAdoo* v. *Callum*, 86 N. C., 419; *Lutz* v. *Thompson*, 87 N. C., 334.

At law, a *feme covert* is incapable of making a contract of any sort, and any attempt of hers to do so is not simply voidable, but absolutely void. If, however, she be possessed of separate property, a court of equity will so far recognize her agreement as to make it a charge thereon. But, even in that case and in that court, her contract has no force whatever as a personal obligation or undertaking on her part.

It is said in *Green* v. *Branton*, 1 Dev. Eq., 500, that the promise of a married woman, except as it may affect her separate property, is held alike in equity and at law to be void, and that there is no court but what regards her promise, merely as such, to be a nullity.

In *Hulme* v. *Tenant*, 1 Brown C. C., 16, LORD THURLOW declared that he knew of no instance in which a contract of a *feme covert* had been held to warrant a personal decree against her, and that the only result of an action against her could be "to fetch forth her separate property and make it liable to her engagements."

The rule laid down in 2 Story's Eq. Jur., § 1397, and which the author says is in conformity with all previous decisions, is, that at law, a married woman cannot bind herself personally, and that not even a court of equity has power to enforce a contract against her *in personam;* but that if she have separate property, the court may proceed *in rem* against it.

Pollock, in his work upon Contracts, 69, says, that a word is needed to express just what that is, which in the case of a person *sui juris* would be a *contract*, but, in the case of a married woman, cannot be a contract, because it creates no personal obligation even in equity; and he adds, "that the separate estate is regarded as a sort of artificial person created by the courts of equity, and represented by the beneficial owner as an agent with full powers, somewhat in the same way as a corporation sole is represented by the person constituting it for the time being; and as a contract made by the agent of a corporation can bind nothing

but the corporate property, so the engagement of a married woman can bind nothing but her separate estate."

Carrying out this same idea, it was declared in *In Re Grissell*, L. R., 12 ch., D. 484, that it was a fallacy to suppose that a married woman is a debtor, because she is liable to have proceedings taken against her to obtain satisfaction of a debt out of her separate estate; for that, "it is not the woman, as a woman, who becomes the debtor, but her engagement has made her property, which is settled to her separate use, a debtor, and liable to satisfy the engagement."

The very nature of the pleadings, in an action of this sort, seems to point to such a conclusion.

In *Francis* v. *Wigzell*, 1 Madd., 258, the VICE-CHANCELLOR declared that inasmuch as a *feme covert* could not contract generally, she could not be sued generally, as any other defendant; but that it was necessary, in order to render her liable, that the bill should aver that she was possessed of separate property and had so contracted as to charge it. Accordingly, in that case, the bill was dismissed, because it failed to allege the existence of a separate estate, and, instead of seeking to charge a particular fund, sought to charge the defendant personally.

There can be no question made that, as our courts were originally constituted, with their functions as courts of law and courts of equity kept distinct, the entire jurisdiction of actions brought to enforce satisfaction of the engagements of *femes covert* was committed to the equity courts, to the exclusion of the others whose judgments are always *in personam*, and could not be otherwise, owing to their very organization.

Nor was there any change wrought in this particular by the alterations made in our court system under the constitution of 1868, or by the adoption of the statute known as the *married woman's act*. It was in reference to these very alterations and the effect of the statute, that the court declared in *Pippen* v. *Wesson*, 74 N. C., 437, and *Huntley* v. *Whitner*, 77 N. C., 392, that no deviation from the common law had been produced

thereby, as respects either the power of a *feme covert* to contract, the nature of her contract, or the remedy to enforce it; that as a contract, merely, her promise is still as void as it ever was, with no power in any court to proceed to judgment against her *in personam;* and that it was only through the equitable powers of the court that satisfaction of her engagements could be enforced as against her separate estate, and then only in case they were seen to be for her advantage.

The nature of the pleadings is substantially the same as under the former system of our courts, and it is essential, in order to establish a right to a special judgment against her separate estate, that the complaint should show, not only that she has such estate, but that her promises are such as by the statute she is rendered competent to make. It was for the want of just such allegations, and because the complaint demanded a personal judgment against the *feme* defendant in *Pippen* v. *Wesson*, *supra*, that the demurrer was sustained and the action dismissed. The mandate of the statute, too, that whenever an execution may issue against a married woman it shall direct the levy and collection of the amount of the judgment against her from her separate property, and not otherwise (C. C. P., § 259), presupposes that all these requisites appear of record, and that the existence of such separate property is fixed by the judgment.

Our conclusion therefore is, that the action is outside of the jurisdiction of the justice in whose court it began, and that the same must be dismissed.

Error. Dismissed.

CHARLES MALLOY and others v. THOMAS J. BRUDEN and wife and others.

Married Women, probate of deeds of—Records.

1. The acknowledgment and privy examination of a married woman in executing a deed for her land, in 1844, is ineffectual to bar her, where, by reason of her inability to attend the county court, a commission to take the probate issued to a single justice: the statute required it to be issued to two or more commissioners. Rev. Stat., ch. 37, construed in *Burgess* v. *Wilson*, 2 Dev., 306.
2. Whenever there is a discrepancy between the certificate of the clerk of a court and the record, the latter controls.

(*Burgess* v. *Wilson*, 2 Dev., 306, cited and approved).

EJECTMENT tried at January Special Term, 1883, of RICHMOND Superior Court, before *Graves, J.*

This action is brought to recover a parcel of land, and the only question involved in the appeal is as to the sufficiency of the probate and privy acknowledgment of a certain deed, executed on the 2d day of October, 1844, to one Charles Malloy by Alexander Malloy and his wife Mary Ann—she being then the owner of the land.

Upon the deed are the following endorsements: "I, John L. Fairley, did go to the house of Alexander Malloy on the 19th of April, 1845, and privately and apart from her husband, Alexander Malloy, examined Mary Ann Malloy, who says she executed this conveyance truly of her own accord, without fear or compulsion of the said Alexander Malloy, her husband." (Signed by John T. Fairley).

STATE OF NORTH CAROLINA, Richmond County. } Court of Quarter Sessions, April Term, 1845.

"When the foregoing deed was exhibited in open court and offered for probate, and it appearing to the satisfaction of the court that John L. Fairley had taken the private examination

of Mary Ann Malloy, the *feme covert*, whose report is hereunto appended, and it also appearing to the satisfaction of the court, that Alexander Malloy had acknowledged the execution of the same at the January term last past of this court, the court ordered the whole to be registered." (Signed by G. A. Nicholson, C. C. C.).

Upon the minutes of the said county court, the following entry appears, at January term, 1845: "A deed from Alexander Malloy and wife, Mary Ann, to Charles Malloy, was exhibited in open court and offered for probate, and duly acknowledged by Alexander Malloy, and it appearing to the satisfaction of the court that Mary Ann Malloy was a *feme covert*, it is ordered by the court that a commission issue to John L. Fairley, one of the body, to take the private examination of Mrs. Mary Ann Malloy, wife of Alexander Malloy aforesaid, touching her executing said deed, and report the same to the next term of the court."

Also, the following at April term, 1845: "A deed of conveyance from Alexander Malloy and wife, Mary Ann Malloy, to Charles Malloy, was exhibited in open court and offered for probate, and it appearing to the satisfaction of the court that John L. Fairley, one of their body, had taken the private examination of Mary Ann Malloy, wife of the aforesaid Alexander Malloy, touching her having executed said deed freely, voluntarily and of her own accord, whose report appears appended to the deed, and it also appearing to the court that Alexander Malloy has acknowledged the execution of said deed at January term last past of this court, the court ordered the whole to be registered."

Accompanying the deed is a commission which was issued by said court to John L. Fairley, the purport of which is as follows:

STATE OF NORTH CAROLINA,

To John L. Fairley—*Greeting:*

"Whereas, Charles Malloy hath produced a deed of conveyance made to him from Alexander Malloy and wife, Mary Ann

Malloy, of a certain parcel of land situate in the county of Richmond and our state, and procured the same to be proved or acknowledged by the said Alexander and Mary Ann his wife, in the court of our said county of Richmond, and it being represented to our said court that Mary Ann Malloy, wife of said Alexander, is so infirm that she cannot travel to our said court, to be privily examined as to her free consent in executing said conveyance: Know ye, that we, in confidence of your prudence and fidelity, have appointed you, and by these presents do authorize you to take the private examination of the said Mary Ann, wife of the said Alexander, concerning her free consent in executing the said conveyance, and therefore we command you that, at such time and place as you shall think fit, you go to the said Mary Ann Malloy, if she cannot conveniently come to you, and privately and apart from her husband examine her, whether she executed the said conveyance freely and of her own accord, without fear or compulsion of her husband, the examination being distinctly and plainly written on the said deed or on some paper annexed thereto, and when you shall have so taken the said examination, you are to send the same, closed up and under your seal, together with this writ, unto our said court to be held for the said county in Rockingham on the 3d Monday in April next. Witness, G. A. Nicholson, clerk of our said court, at office, the 17th day of March, A. D. 1845." (Signed by Nicholson, as clerk).

The plaintiffs in the action claimed under said deed. His Honor was of the opinion that the probate and acknowledgment thereof were not sufficient to bar the *feme covert* or her heirs, and the plaintiffs then submitted to a judgment of nonsuit, and appealed.

Messrs. Burwell, Walker & Tillett, for plaintiffs.
Messrs. Frank McNeill and *J. D. Shaw,* for defendants.

RUFFIN, J. The court does not hesitate to concur in holding the deed to be ineffectual to pass the estate of Mrs. Malloy in the land, for want of a due acknowledgment and privy examination on her part.

As the commission which issued was directed to a single commissioner, and with authority to him, alone, to receive her acknowledgment and take her private examination, there can be no pretence (nor was there any made upon the argument) that the probate was valid under the third and fourth sections of the act of 1751 (Rev. Stat., ch. 37, §§ 10 and 11), in which provision is made for taking the probate of the deed of a married woman, who, by reason of her infirmity, is unable to travel to the court: for the express direction of the statute in such case is, that the commission shall issue, and the authority confided in, not less than *two commissioners*.

The only other provision, at that time made, for the probate of deeds of *femes covert* before the county courts, was that contained in the second section of the same act (Rev. Stat., ch. 37, § 9); and contrasted with it, the mode of proceeding with the deed in question was fully as defective and inoperative as under the sections first referred to.

The provisions of this section were all brought under review in *Burgess* v. *Wilson*, 2 Dev., 306, and the construction which was then put upon it, has been ever since accepted by the courts and the bar as the true one. It was there held essential, in order to convey the lands of a married woman capable of attending the court, that her deed should be first personally acknowledged by both her husband and herself in open court, and that her private examination should be then and there taken, within the verge of the court, by some one sitting as a member thereof; that it was intended that the acknowledgment and the examination should be taken together (or rather as one continuous transaction), the former in the hearing of the whole court, and the latter within its precincts; but that neither should ever be taken by a single justice, and as a matter *in pais*.

The reason of all this particularity was said to be to avoid, as far as possible, giving any opportunity for collusion between the husband and the justice who might be appointed to conduct the examination.

It is plain that the deed of the wife in this instance was never acknowledged by her, or her consent thereto ascertained, except before a single justice, and at her own home, admitted to be eighteen miles from where the court was sitting. True, the clerk's commission recites an acknowledgment as having been made by her before the court, but the records as made at both January and April terms—the one preceding and the other succeeding the taking of her private examination—positively contradict this, and put it beyond dispute that the only acknowledgment which was made in court was that of the husband alone; and in the case just cited it was distinctly said, that wherever the certificate of the clerk was contradicted by the record, it must be controlled thereby. It is evidently impossible, under such circumstances, and when the defect in the proceeding so plainly appears of record, to give any force to the maxim, *omnia præsumuntur rite esse acta*. To do so, would be to close our eyes to the well established truth, and to adhere to falsity simply because of its antiquity.

The court can perceive no error in the judgment of the court below, and the same is therefore affirmed.

No error. Affirmed.

WILLIAM H. REEVES v. ISAAC N. HAYNES.

Husband and Wife—Deed.

A deed of the husband, without the joinder of his wife, conveying lands owned by him before the adoption of the constitution of 1868, the marriage being prior to that date, passes his estate free from the claim of dower and homestead.

(*Sutton* v. *Askew*, 66 N. C., 172; *Bruce* v. *Strickland*, 81 N. C., 267; *Jenkins* v. *Jenkins*, 82 N. C., 208; *O'Kelly* v. *Williams*, 84 N. C., 281; *Williams* v. *Teachey*, 85 N. C., 402; *Wittkowski* v. *Watkins*, 84 N. C., 456; *Isler* v. *Koonce*, 81 N. C., 378; *Davis* v. *Evans*, 5 Ired., 525, cited and approved.)

EJECTMENT tried at Fall Term, 1882, of WILKES Superior Court, before *Gudger*, *J.*

The land sought to be recovered in this action belonged to the defendant, who on March 27th, 1876, conveyed the same by a deed of mortgage to Noah Brown to secure the payment of the sum of two hundred dollars then loaned to the defendant, with a power of sale to the mortgagee in case of default in making payment. The equity of redemption was afterwards conveyed by the defendant to the plaintiff in a deed similar in its terms to the other.

The land was acquired by the defendant several years before the adoption of the constitution of 1868, and his marriage with his wife took place before the late civil war. The defendant's wife did not unite with her husband in executing either deed, and they have several minor children. Under the first mortgage, and pursuant to its terms, the land was sold at public sale and purchased by the plaintiff, to whom title has been made.

Upon these facts the court expressed the opinion that the plaintiff could not recover, upon what ground the record does not disclose, and in submission thereto the plaintiff took a nonsuit and appealed.

Mr. L. L. Witherspoon, for plaintiff.
No counsel for defendant.

SMITH, C. J. We suppose the ruling was made on the ground that the right to a homestead therein, it being conceded that the premises were not worth more than one thousand dollars, was not divested by the deeds executed by the defendant alone. In this we think there is error, and the ruling is in conflict with the adjudications heretofore made in this court.

In *Sutton* v. *Askew*, 66 N. C., 172, it is decided that the act of the general assembly restoring to the widow the common law right of dower in all estates of inheritance whereof the husband was seized at any time during the coverture, was inoperative as affecting lands acquired by him, and when the marriage also occurred, before the change in the pre-existing law. It is declared that the husband could alienate and pass the title to such lands without the consent of his wife.

Following the principle thus announced, we held in *Bruce* v. *Strickland*, 81 N. C., 267, that lands owned by the husband previous to the adoption of the constitution, and where the marriage was also prior to that date, could be conveyed by his deed free alike from the claim of dower and homestead; and when he had exercised the right of disposition retained by him, notwithstanding the provision, in unabridged force, it was beyond his recall. This case has been referred to and approved in *Jenkins* v. *Jenkins*, 82 N. C., 208; *O'Kelly* v. *Williams*, 84 N. C., 281, and *Williams* v. *Teachey*, 85 N. C., 402.

The homestead being out of the way, and the legal title vesting in the plaintiff under the deed from the mortgagee, Brown, we can perceive no obstruction to his recovery of the possession of the land. *Wittkowski* v. *Watkins*, 84 N. C., 456; *Isler* v. *Koonce*, 81 N. C., 378. Indeed, as between the mortgagor and mortgagee of an equity of redemption, the legal title being in a former mortgagee or trustee, the latter has a right to recover possession from the former. *Davis* v. *Evans*, 5 Ired., 525.

There is error, and the nonsuit must be set aside and a *venire de novo* awarded, and it is so adjudged.

This will be certified for further proceedings in the court below.

Error. *Venire de novo.*

EDITH E. HOUSTON v. A. J. SMITH and others.

Dower—Deed of Surrender.

1. A widow is entitled to dower only in an estate of inheritance, of which the husband had a seizin in law or a seizin in deed, at any time during the coverture; and therefore she is not dowable of a reversion or remainder expectant upon an estate of freehold.
2. A particular estate of freehold may be surrendered to the remainderman by deed, but not by a parol agreement.

SPECIAL PROCEEDING for dower begun in the probate court and tried at July special term, 1882, of DUPLIN Superior Court, before *Gilliam, J.*

The plaintiff is the widow of John E. Smith, and now the wife of one Houston.

The case was submitted by the parties to the judge to find the facts, which are as follows:

Kinsey Whaley died seized of the land in controversy, and by his will devised the same to his wife, Nancy J., for her life, and the remainder to J. J. Whaley and Ephinia Whaley.

John E. Smith, the father of defendants, purchased the interest of J. J. Whaley, and intermarried with Ephinia Whaley, and the defendants are the issue of that marriage. After the death of Ephinia, John E. Smith intermarried with the plaintiff, and died in 1873 in possession of the land. He rented the land from Nancy J. Whaley for several years. She died in 1881.

The plaintiff offered to prove that two or three years before

the death of John E. Smith, Nancy J. Whaley released him from all rent in the future, and agreed that he should occupy the place during her life without charge. The testimony was objected to, and excluded by the court. The plaintiff excepted, the exception was overruled, and judgment given for the defendants, from which the plaintiff appealed.

Mr. H. R. Kornegay, for plaintiff.
Mr. O. H. Allen, for defendants.

ASHE, J. The only point presented by the record for our consideration is—was there error in the refusal of His Honor to receive the evidence offered by the plaintiff in relation to the alleged release from rent, and to the agreement on the part of Nancy Whaley that John E. Smith might occupy the land during her life without charge.

By the act of 1868–'69, every married woman, upon the death of her husband intestate, or in case she shall dissent from his will, shall be entitled to an estate for her life in one-third in value of all the lands, tenements and hereditaments, whereof her husband was seized and possessed at any time during the coverture, &c. Of course it must mean an estate of inheritance.

The word "seizin" has a technical meaning in this connection. It is either a seizin in deed or a seizin in law: the former is, where there is an actual possession of a freehold estate; the latter, where there is a right to an immediate possession or enjoyment of a freehold estate. Seizin only applies to freehold estates.

A seizin in law of the husband is as effectual as a seizin in deed, in order to render the wife dowable, but the husband must have the one seizin or the other of an estate of inheritance, to give to his widow a right to dower. There is no such thing as a seizin of a remainder after a freehold estate, because the remainderman has no right to the possession or enjoyment of the land until the determination of the particular estate, and,

therefore, a widow is not dowable of such a remainder; but if the particular estate is a chattel, as an estate for years, then the possession of the tenant is the possession of the remainderman, and, as, in that case, the only freehold interest is in the remainderman, he is said to be seized of the remainder, and his wife may be endowed of his lands so holden.

In 1 Scribner on Dower, page 217, it is said: "To give a right of dower, the estate of the husband must confer a right to the immediate freehold. This is an essential requisite at the common law. Dower is not allowed in estates in reversion or remainder expectant upon an estate of freehold; and hence, if the estate of the husband be subject to an outstanding freehold estate, which remains undetermined during the coverture, no right of dower attaches."

What was the nature of the evidence offered by the plaintiff is not made to appear, but as no deed was offered to be introduced, we must assume that the evidence only had relation to a parol agreement, and in that case the estate of Nancy Whaley, being a freehold, could only be passed by a deed—properly a deed of surrender. If the plaintiff was relying upon a deed, and such was the evidence she proposed to offer, to make her exception available, she should have offered to introduce the deed, duly registered, otherwise it would not have been admissible in evidence.

So far as appears from the record, the evidence offered was a mere parol agreement by Nancy Whaley with Smith for him to occupy the land without rent, which made him a tenant at will, leaving the freehold in Nancy and the remainder in Smith, in whom there was no seizin, and not being seized of the land during his life, his wife acquired no right of dower therein. The judgment of the superior court is affirmed.

No error. Affirmed.

WILLIAM STRICKLAND v. W. H. DRAUGHAN.

Deed, probate of—Ejectment, evidence in—Entries and Grants—Practice—Statement of Case, preparation of.

1. A certified copy of a deed is evidence of its probate and registration; and a probate as follows: "Sampson county, August term, 1812: Then was the above deed acknowledged in open court, H. Holmes, C. C.", shows the official character of the clerk.
2. Parol evidence is admissible to show the position of boundary marks mentioned in a deed.
3. Where a deed calls for a natural object and the line gives out before reaching it, the line must be extended to the natural object and the distance disregarded.
4. A copy of an abstract of a grant, dated in 1799, bearing the signature of the governor of the state and certified to by the register, is admissible in evidence to show that the land has been granted.
5. Errors assigned must be specifically pointed out, or no correction will be made.
6. The court condemn the practice of judges and members of the bar in incorporating superfluous matter in the statement of the case on appeal, and again suggest the propriety of stating only those facts which are pertinent to the exceptions taken upon the trial.

(*Starke* v. *Etheridge*, 71 N. C., 240; *Love* v. *Harbin*, 87 N. C., 249; *Jones* v. *Bunker*, 83 N. C., 324, and cases cited; *Tolson* v. *Mainor*, 85 N. C., 235, and cases cited; *Brooks* v. *Britt*, 4 Dev., 481; *Hurley* v. *Morgan*, 1 Dev. & Bat., 425; *Tatem* v. *Paine*, 4 Hawks, 64, cited and approved).

EJECTMENT tried at January Special Term, 1882, of SAMPSON Superior Court, before *McKoy, J.*

The defendant appealed.

Messrs. E. T. Boykin and *Reade, Busbee & Busbee*, for plaintiff.

No counsel for defendant.

SMITH, C. J. The plaintiff sues to recover a tract of land whose boundaries are specifically set out in his complaint, and

damages for a wrongful withholding. The defendant asserts title to the portion described in his answer and disclaims as to the residue.

In response to the three issues prepared and submitted to the jury they find, 1. The plaintiff is entitled as owner to all the land mentioned in his complaint; 2. The defendant was in the wrongful possession when the action was commenced; 3. The plaintiff's damages are assessed at $150.

The errors assigned are to rulings of the court to which exceptions were taken during the progress of the trial, and these the appeal presents for our consideration. They will be noticed consecutively as they appear in the record.

1. The plaintiff produced in evidence a duly certified copy, from the registry, of a deed made on May 11th, 1812, by John Dickson, attorney of Samuel W. Johnson, to John McCorquodale, conveying 129 acres, on which is transcribed and has been registered a probate in the following form:

"SAMPSON COUNTY, August Term, 1812: Then was the above deed acknowledged in court for registration.

H. HOLMES, C. C."

The records of the county court of Sampson, in custody of the superior court clerk, show an entry at the same term that a deed from John Dickson, attorney, to John McCorquodale, for 129 acres of land, was acknowledged in open court for registration, and this was the only entry, at that term, of a deed between the same parties. The record also mentions an allowance at May term, 1812, for extra services for the preceding year, rendered by "Hardy Holmes, clerk of the county court of Sampson county," and a similar entry at May term, 1813, for similar services to the same party, again designated as "clerk of the county court of Sampson." It was also proved that the records of the years 1812 and 1813 were in the same handwriting.

The defendant insisted upon the insufficiency of the proof offered as to the official character of the clerk, and objected to the admission in evidence of the copy of the deed. The objection was overruled and the copy allowed to be read; and this furnishes the first exception to be considered.

The exception is, in our opinion, without support in any adjudication or sound rule of law. The proof meets and removes the objection, if it has any force, and the probate in the county court is fully established. Indeed, there was no necessity for any other evidence of probate or registration than such as was contained in the copy, certified from the books of registry of deeds. The statute in express terms declares that "the registry or duly certified copy of the record of any deed, power of attorney, or other instrument required or allowed to be registered or recorded, may be given in evidence in any court (Bat. Rev., ch. 35, § 9), and it is to be assumed that the deed was properly put upon the registry, until the contrary is made to appear, and nothing more is required to render the copy competent evidence when certified by the register. *Starke* v. *Etheridge*, 71 N. C., 240; *Love* v. *Harbin*, 87 N. C., 249.

We suppose the case last cited was not known at the time, or the point would not have been made.

2. A surveyor of long experience was asked, and permitted to say, that the boundary lines mentioned in the deed from Lewis Tew to Elizabeth Goodwin (of which we have no further information than this mention of it, and none as to its provisions) cover the territory in dispute. If the fact proved be material and bears upon the controversy, we see no reason for objecting to the competency of testimony admitted to show the location of the lines of the deed, and that it embraces the tract claimed in the suit. Indeed, by parol evidence alone can the position of boundary marks mentioned in a deed be fixed and the area enclosed be ascertained. What are the boundaries of land described in a written instrument is a matter of law to be declared by the court; where they are, a matter of fact to be

found by the jury on evidence. *Marshall* v. *Fisher*, 1 Jones, 111; *Clark* v. *Wagoner*, 70 N. C., 706; *Jones* v. *Bunker*, 83 N. C., 324.

3. The witness who made the survey and plat used on the trial testified that, in running the line described in the deed from Edwin Strickland and others to the plaintiff, of January 10th, 1855, "thence the other due line north 65, east 100 poles to a maple and gum in the Big Branch"—it gave out a short distance before reaching the mud-land of the branch, and at its terminus no such trees were to be found. The defendant insisted that in law the line stopped at the point measured by the 100 poles, and requested His Honor so to instruct the jury. This was refused, and the jury were directed to inquire upon the evidence as to the location of the maple and the gum, as a fact to be found by them. There was no exception to the form of the instruction given, but it was taken to the refusal of the court to withdraw the matter from the jury and determine it as solely involving a question of law.

The trees referred to are represented as *being in the branch*, not upon the adjoining high-land traversed by the line before reaching it. If the trees cannot be found, nor their location be fixed, the branch, equally designated in the descriptive words, remains, and the course continued on will intersect it. There is thus a natural object called for, whose position is fixed, and the line gives out before reaching it; and it is well settled that in such case the line must be extended to the natural object and the distance disregarded. *Tatem* v. *Paine*, 4 Hawks, 64; and numerous other cases.

The court, upon the authority of *Brooks* v. *Britt*, 4 Dev., 481, and *Hurley* v. *Morgan*, 1 Dev. & Bat., 425, referred to the jury the inquiry as to the terminus of the line, the locality of the trees and branch, and certainly in this respect committed no error of which the defendant can complain; and if it was error, it is corrected by the finding of the jury.

The testimony all tends to show, and if not conceded, it was

not questioned that it does show, that if the line run to the branch or stream, designated as the Big Branch, and thence pursues its meandering course, as it flows into the Williamson Swamp, as the next line is described in the deed, it will embrace the *locus* in dispute; while if it stops at the mud-land and passes along the margins of this and of the swamp, not entering either, the disputed land will be excluded. The exception, therefore, must be overruled.

4. The defendant's fourth exception is to the reading of the certified copy of the deed or abstract, as it is called, of the state to Roger Allen, bearing date June 7th, 1799, to show that the land has been granted and the title of the state thereto divested.

The exhibit seems to be incomplete, but enough appears upon its face to show its character as a grant of land of large dimensions to the grantee, Allen, and it bears the signature of the governor (W. R. Davie) and is certified by the register as taken from the registry. It is certainly admissible for this reason, as evidence, and to this alone is the exception directed. But we think it is also sufficient to show that the land has been granted, and for this purpose only is it offered. But abstracts—not purporting to be copies in full of the original—have been received when authenticated as records kept under requirements of law. *Clark* v. *Diggs*, 6 Ired., 159; *McLenan* v. *Chisholm*, 64 N. C., 323; *Tolson* v. *Mainor*, 85 N. C., 235.

5. The title being thus out of the state, the plaintiff alleges a continuous adverse possession for more than seven years under the deed to him of Edwin Strickland and others, and by this a vesting of the estate therein in himself. Almost the entire case is occupied with a statement of acts of ownership, of various kinds, upon the land as constituting possession. The defendant insists that these are but frequent and separate trespasses, not a possession to ripen an imperfect into a perfect title. This evidence was passed on by the jury, under instructions which seem to have been free from objection.

The defendant asked a charge that there was no evidence of a

continuity of possession for the necessary period, which the court declined to give, and to this refusal an exception is noted.

It is a well understood rule of practice that errors assigned must be specifically pointed out, and wherein they consist, or no correction will be made. The testimony is loose and disconnected in time and place, extending over a series of years; showing the erection and occupation of a house; the clearing and cultivating portions of the land, fit for that purpose; the cutting of trees and making shingles upon the parts in dispute; the getting and gathering of turpentine, and other acts indicating an assertion of ownership, amply sufficient, if unbroken, to confer title on the plaintiff, if he did not have it before. We cannot see the alleged interruptions in the facts proved, and the required occupation seems to have been maintained, at least the jury were warranted in so finding, and their verdict ought not to be disturbed for the reason urged.

We may misunderstand the case on this point to the defendant's prejudice; but if so, the result must be ascribed to the vague and unintelligible statements of the proof, and our inability, in consequence, to detect an error assigned in such general terms, and the fault in this regard lies at the door of the appellant. This exception must be also overruled.

Before closing the opinion, we are forced to animadvert upon the manner in which the case is prepared and sent up for review, and it is but an example of many others. The facts testified to are disconnected and confused, and indefinite in time and locality, and the defect is unaided by the accompanying diagram. The testimony of the several witnesses is written without any break in passing from one to the other, and is itself vague and unsatisfactory. There are no marginal abstracts to indicate what is upon the pages, and no index to direct to the witnesses or the character of the evidence they give. Added to this, and sent as part of the record, are the notes of the presiding judge, *in extenso*, taken during the trial. It ought to be needless to reiterate that in cases like the present where a verdict is taken, the facts should

be sent up pertinent to and explanatory of the exceptions, and not the evidence, unless the exception be to its admission or rejection, or to its failure upon a point submitted to the jury, and then only so far as it elucidates the exception. If cases are sent up, thus laden with useless matter and burdensome to the court, and our repeated suggestions are unheeded, we shall be compelled to remand the cause or refuse to hear it, until by a reference the superfluous matter can be removed and the record put in a proper form for an intelligent disposition. The accumulating business before the court and our increasing labors in dispatching it, will force this necessity upon us, unless gentlemen of the bar and the judges give more care and attention to the preparation of cases on appeal.

In this case there may be error, but we cannot see it and it must be decided as if no error existed.

The judgment must be affirmed.

No error. Affirmed.

GEORGE V. CREDLE v. JAMES W. HAYS and others.

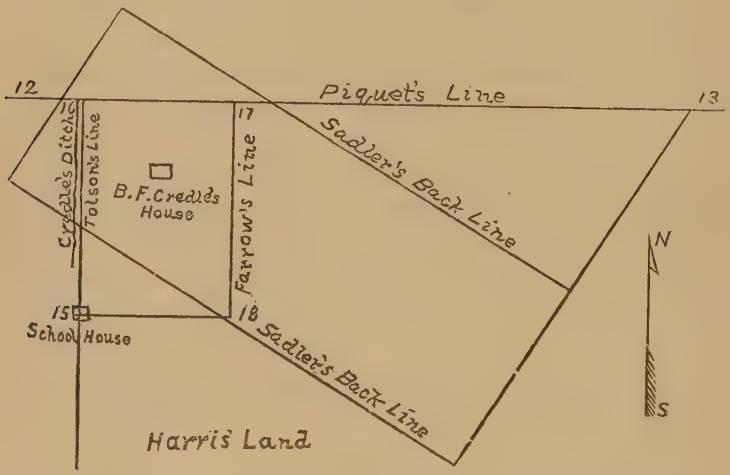
Deed—Mistake as to course and distance may be corrected.

A mistake, as to course and distance in the calls of a deed, may be corrected where the means of correcting the same are furnished by more certain descriptions contained in the deed; and where there is a discrepancy between course and distance and the other descriptions, the former must give way.

(*Cooper* v. *White*, 1 Jones, 389; *Person* v. *Roundtree*, 1 Hay., 378; *Campbell* v. *McArthur*, 2 Hawks, 33; *Houser* v. *Belton*, 10 Ired., 358; *Corn* v. *McCrary*, 3 Jones, 496, cited and approved).

EJECTMENT tried at Fall Term, 1882, of HYDE Superior Court, before *Gilliam, J.*

A jury trial was waived, and the court found the facts to be substantially as follows:



Both parties claimed title to the land in dispute from B. F. Credle. The *locus in quo* is described by the lines indicated on the diagram by the figures 15, 16, 17 and 18. The plaintiff claimed under a sheriff's deed, purporting to sell and convey the land as the property of B. F. Credle, bearing date the 7th of October, 1878; and the defendants, under a sheriff's deed to Tilson G. Credle, dated July 5, 1869, and also a sheriff's deed (reciting a sale of the land as the property of said Tilson) to Agnes Credle, dated March 4, 1871, and a deed from Agnes to William Credle, one of the defendants.

The land conveyed in the sheriff's deed to Tilson was described as beginning at a school-house on the public road, running in an easterly course to Nasa Farrow's line, thence with his line in a southerly direction to the back line of Sadler's patent, thence westwardly with said patent line to the Credle ditch, leading to Oyster creek, thence northerly with said ditch to the beginning, containing about one hundred acres.

After the purchase of the land at sheriff's sale by Tilson, by

his permission and that of Agnes Credle and the defendant, William Credle, B. F. Credle continued to occupy the house (marked on diagram "B. F. Credle's house"), but claimed no interest in the premises. He had no other house, nor had he owned any other land. The defendants took possession of the land some time before the 7th of October, 1878, and cleared a portion of it about the house, and continuously cultivated it up to the trial.

The land lying south of the line, 15—18, for many years before the trial belonged to one Harris; that on the east of the line, 17—18, was owned by Nasa Farrow; and that on the north of the line, 12—13, belongs to George V. Credle, the plaintiff. Tilson's line runs from 16 to 15. Credle's ditch runs south from 16. The school-house called for is at 15, and Piquet's line runs from 12 to 13.

The judgments under which both the plaintiff and the defendants claim, were founded upon ante-war debts.

The case states that "no question was made on the trial, except as to the construction of the sheriff's deed to Tilson G. Credle, whether upon the facts found, the second call in that deed, 'southerly,' was controlled by the call along Farrow's line, by the second call for Credle's ditch, and be read 'northerly,' and the fourth call, 'northerly,' be read 'southerly,' to reach the school-house, the beginning. It was admitted that with these changes in the calls of the deed to Tilson Credle, that deed would enclose the land then owned and occupied by B. F. Credle—the land in controversy."

His Honor held that the calls in said deed were erroneous, and were controlled by the more certain description of the land in the deed, and gave judgment for the defendants, and the plaintiff appealed.

No counsel for plaintiff.

Mr. Geo. H. Brown, Jr., for defendants.

ASHE, J. It is well settled by repeated adjudications of this court, that where a mistake occurs in the course or distance contained in the calls of a deed, it will not be permitted to disappoint the intent of the parties, if that intent appears, and the means of correcting the mistake are furnished by a more certain description in the deed. *Cooper* v. *White*, 1 Jones, 389; *Person* v. *Roundtree*, 1 Hay., 378; *Campbell* v. *McArthur*, 2 Hawks, 33, and *Houser* v. *Belton*, 10 Ired., 358, in which Chief-Justice PEARSON says that the reason for making course and distance give way to a natural boundary, or the lines of another tract, or to marked lines and corners, is, because a mistake is less apt to be committed in reference to the latter than the former. Indeed, he says, the former is considered the most uncertain kind of description; "for it is very easy to make a mistake in setting down a course and distance, when transcribing from the field-book, or copying from the grant or some prior deed; or a mistake may occur in making the survey, by losing a stick, as to distance; or making a wrong entry, as to course. For these reasons, where there is a discrepancy between course and distance and the other descriptions, the former is made to give way."

In our case, the *intent* of the parties to the deed from the sheriff to Tilson Credle to convey the land owned by B. F. Credle (the defendant in the execution under which it was sold) manifestly appears from the deed itself; and if the calls of courses in the deed should be held to be the true boundary of the land conveyed, the intent of the parties would be entirely disappointed; for the deed, according to the calls, covers no part of the land evidently intended to be conveyed.

The only land owned by B. F. Credle, and in fact the only land ever owned by him, lies to the north of the line leading from the school-house to Farrow's line; but if the calls in the deed should be followed, disregarding the other descriptions contained in it, it would throw the land conveyed entirely on the south of that line, upon the land of Harris, and if there is no

more certain description in the deed to control its calls, the defendant has failed to acquire any title to the land in dispute.

But we think the means of correcting the mistake, in the calls of the sheriff's deed, are amply furnished by the other and more certain descriptions in the deed.

The first call in the sheriff's deed is from the school-house easterly to Farrow's line, which is found to run from 15 to 18 in the diagram. The next call is with his line in a "southerly" direction to Sadler's back line, which is evidently a mistake, for Farrow's line runs northward from the point where it is met by the first call of the deed, and that must control the second call of the deed, whether the line be marked or not. *Corn* v. *McCrary*, 3 Jones, 496. And although His Honor has not found, as a fact, the location of Sadler's back line, which seems to have been in dispute from the plat accompanying the transcript, both parties agree in its location north of the point of intersection of the first call of the deed and Farrow's line, and which ever may be the true location, following Farrow's line to it, the course is *northward.*

The third call is westerly to Credle's ditch, which is found to run from figure 16 in the diagram, south, in the direction of the school-house—an unmistakable description; and then the fourth call *northerly* with said ditch to the beginning, is manifestly a mistake, and must be read *southerly*, or the line would never reach the beginning at the school-house.

So then, the location of the land owned by B. F. Credle, the Farrow line, Sadler's back line, and the Credle ditch, all being found to lie north of the first call of the sheriff's deed, are such descriptions of the land intended to be conveyed as show beyond a doubt that the courses in the second and fourth lines were, through mistake, written *southerly* and *northerly*, instead of *northerly* in the second and *southerly* in the fourth line; and it having been admitted that if these changes in the courses of the deed from the sheriff to Tilson Credle should be made, the deed

covers the land in controversy, then there is no error, and the judgment of the superior court must be affirmed.

No error. Affirmed.

A. B. DAVIDSON v. M. D. ARLEDGE.

Deed—Color of Title—City Lots.

1. A deed is color of title only for the land designated and described in it.
2. A dispute as to the true location of a line separating two town lots must be determined by an interpretation of the descriptive words contained in the deeds.
3. If the words simply designate the lots by number, the boundary, as circumscribed by actual use and occupation, is the one meant by the bargainor. But where they refer to the lots not only by number, but "as known and designated in the plan" of the town, which plan contains a specific description thereof, it is the same as if that description were incorporated in the deed, and the latter must prevail; and it is incompetent to show by parol that the boundaries were intended to be different.
4. Whether a dividing line between contiguous tracts can be changed by recognition and acts of ownership of the proprietors (?).

(*Reed* v. *Schenck*, 2 Dev., 415, cited and approved).

EJECTMENT tried at January Special Term, 1882, of MECKLENBURG Superior Court, before *Bennett, J.*

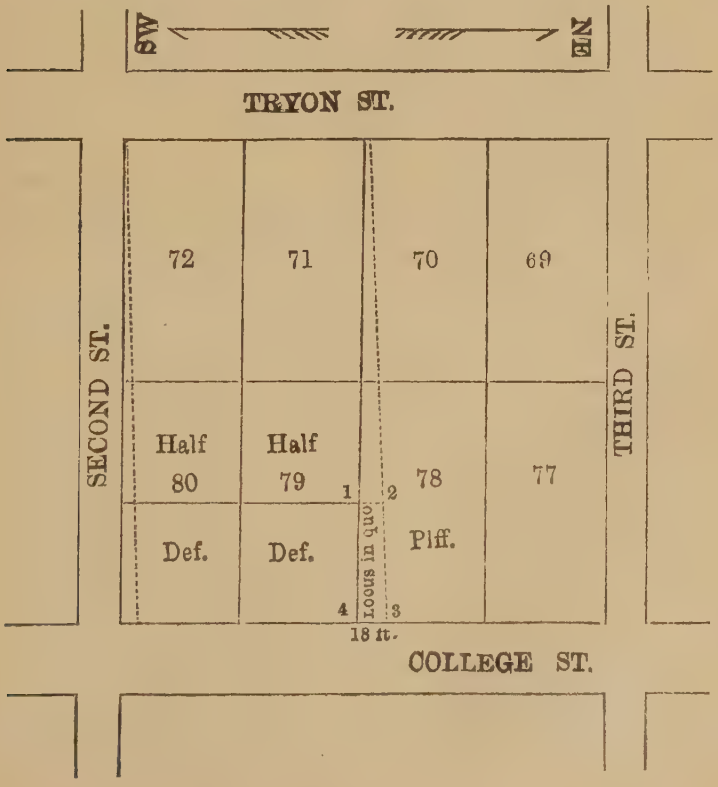
Appeal by plaintiff.

Messrs. Jones & Johnston, for plaintiff.

Messrs. Wilson & Son and *Burwell & Walker*, for defendant.

SMITH, C. J. The controversy in this cause is as to the proper location of the boundary line between two adjacent lots, one of which belongs to the plaintiff, the other to the defendant.

In the original laying off and plan of the town, now the city of Charlotte, a square bounded by Second, Tryon, Third and College streets, and embracing both lots, known as square number ten, was divided into equal parts by a line extending from Third to Second street, bisecting the boundary of the square on those streets, and made the rear line of the lots fronting on Tryon and College streets. These lines extending across the square from Tryon to College streets at points equally distant one from the other, and forming right angles at their intersection with the rear line first mentioned, divided the entire square into eight lots, four fronting on Tryon and the same number fronting on College street, each of the width of ninety-nine feet and of the depth of one hundred and ninety-eight feet.



These four lots fronting on Tryon street, counting from Third to Second street, were numbered successively 69, 70, 71 and 72; while those on College street, enumerated in the same direction, were designated as 77, 78, 79 and 80.

A divisional line running from a point on Tryon street, equally distant from the corners of the square on that street to a point on College street, also equally distant from the corners of the square on that street, will terminate on College street at the place contended for by the plaintiff, and put the disputed territory within the limits of lot 78, owned by him.

The defendant claims that the dividing line, whatever may have been its original location, is formed by running from the admitted starting point on Tryon street, and terminating on College street, eighteen feet northeast from the terminus claimed by the plaintiff, as represented by dotted lines in the diagram.

The plaintiff deduces his title through an unbroken series of deeds, commencing with a deed executed by Henry Eustace McCulloch to the commissioners of Charlotte in 1767, and extending down to the deed executed by Daniel Asbury to William E. White in 1858, in all of which, except the first, the land is described as lots Nos. 69, 70, 77 and 78.

The plaintiff then introduced the will of W. E. White conferring an authority upon his executor to sell, and a deed of conveyance from the executor to himself on May 22d, 1869, describing the lots as being in the city of Charlotte in these words: "The following lots in said city, and known and designated on the plan thereof as numbers sixty-nine (69), seventy-seven (77), seventy (70), and seventy-eight (78), in square number 10, lying on Tryon street and College street, being the property on which said testator lived at his death." These lots, as shown in the diagram, constitute the area of the square lying on the northeast of the central dividing line from Tryon to College street, the true position of which forms the subject of dispute.

The defendant derives his title from the deed of Joseph H. Wilson, administrator of one R. E. Carson, a former owner,

bearing date May 3d, 1861, for lots number 79 and 80, being the two fronting on College street, and nearest to Second street, forming one-fourth part of the square, to William E. White, and a deed from the executor made to the defendant on June 14th, 1870, in which the land is described as "that portion of lots number 79 and 80 fronting on College street and running back 80 feet to the line of the dower of Mrs. Carson; thence with said dower line to the line of the lots of A. B. Davidson; thence with his line 80 feet to College street; thence with College street 198 feet to the beginning."

It was shown that, upon measurement from the intersection of Third and College streets, as Third street was first laid out, and disregarding its subsequent widening, the distance to the point where the black dividing line meets College street is one hundred and ninety-eight feet, while to the point where the dotted line is met the distance is one hundred and eighty feet—the difference being eighteen feet, the length of the base line of the portion in contest.

In like manner, measuring on College street from the corner of the defendant's lot on Second street, the distance thence to the point marked 4, where the black line meets College street, is one hundred and ninety-four feet, while if extended to the dotted line at three it is two hundred and twelve feet.

From these measurements it is manifest, and the contrary does not seem to have been pressed, that according to the first formation of the boundaries of the lot, as the city was laid out, the disputed area is entirely within the lines of lot 78, and if the controversy is to be decided according to their primary location, the plaintiff is entitled to recover.

But it was in evidence that the dotted line between Tryon and College streets has been recognized as the division line between the adjoining lots by their former proprietors, and possession held and acts of ownership exercised on either side up to it for a period of more than thirty years, without interruption, until the title to both on College street vested in the testator, W. E.

White, under the respective deeds of Daniel Asbury in 1858, and of Wilson, administrator, in 1861, when he became the owner of the land on either side of the line in controversy, and the adversary occupation ceased.

The long possession thus shown, with unquestioning acquiescence on the part of preceding proprietors of the plaintiff's lots, not only raises a presumption of a prior grant from the state, as charged by the court, but of a conveyance from one proprietor to the other, so as to make such the true line separating the adjacent lots.

But when the testator became the owner of both adjacent lots, the line could be obliterated, however well established before, by him or his authorized executor, in any conveyances either might thereafter choose to make to different purchasers. The first of the subsequent deeds, executed by the executor of White, is to the plaintiff; and as that made a year later to the defendant calls for and recognizes the plaintiff's line along which it runs to College street, it is obvious the solution of the controversy is to be found in putting a construction upon the descriptive words contained in the prior deed of the plaintiff, and ascertaining to what land they are to be fitted.

If these words of description simply designated the lots by number, it might be urged with much force that the boundary, as circumscribed by actual use and occupation extending back over so long an interval of time, was that meant by the bargainor, the lot retaining its name by number, although of diminished area.

But this reasoning is not sustained by the descriptive language of the deed. The lots are not only referred to by number, "*but as known* and designated in the plan thereof," that is, with the same boundaries which located and defined them in the first or original plotting and laying off of the town.

This interpretation seems to be required to give operation and scope to the language employed in designating the subject matter of the deed; and this, the authorized representative of the

owner of both, was at full liberty to do. He has chosen to go back in parcelling out the land, and re-instate the original boundaries between different purchasers, and this expressed intent must prevail over all inferences to be drawn from the acts and recognitions of preceding owners.

The construction of the plaintiff's deed was a question of law, and it was the duty of the judge to declare *what were the boundaries* called for in the deed, and to leave the jury to ascertain *where they were.*

We do not see how the defendant's deed could be color of title so as to encroach upon the plaintiff's land, when its line stops at the plaintiff's boundary and follows it to College street. A deed is color only for what land is designated and described in it, and there can be no overlapping effect ascribed to it to divest or impair the title to land which it merely touches. Indeed there is no contest between the parties as to the ownership of these respective lots, but as to the true location of the line that separates them, and this must be determined by putting an interpretation upon the descriptive language contained in the plaintiff's deed to which that of the defendant conforms.

We have not, in this view, considered the able and instructive argument, apparently supported by numerous cited cases for the proposition that a dividing line between contiguous tracts can be changed by recognition of the respective proprietors, accompanied by acts of ownership and possession on either side, short of the period which raises the presumption of a conveyance consistent with the possession, for the point is not material in deciding the present controversy. If it were, we should be reluctant to follow those adjudicated cases, and give such force and effect to a mere parol agreement so much at variance with the current decisions in this state. They may be the offspring of the repudiated doctrine of part performance of a contract required by the statute of frauds to be in writing, and proceed upon the idea that as under these circumstances a court of equity will enforce, so a court of law will recognize the long acquiescence in a parol

contract in regard to boundary of adjoining lands, as establishing rights and estopping parties from disputing it. Such are the reasons assigned in some of the cases for the ruling.

The correct rule which commends itself to our approval is laid down with great clearness by Chief-Justice HENDERSON in a case with features very much like our own, and in which it was proposed to prove the boundaries of a lot, described by course and distance in the deed, by showing where the lines were originally run and have been since recognized by corresponding acts of ownership.

He says, delivering the opinion of the court and referring to cases in which course and distance had been made to conform to actual boundary marks put up at the time, but not mentioned in the deed:

"Many of them never met the approbation of the profession, and for many years we have in all cases, I believe, except one, adhered to the description contained in the deed, and it is much to be lamented that we do not altogether." * * * "This," he continues—meaning the exception, "is going as far as prudence permits; for what passes the land not included by the description in the deed, but included by the marked line? Not the deed, for the description contained in the deed does not comprehend it. It passes therefore by parol or by mere presumption. As far as we know there has been no series of decisions by which the description in the deed is varied by marks, unless they were made for the *termini* of the land described in the deed, or supposed to be so made, and to which it was intended the deed should refer; or to which it was supposed the deed did refer, or rather supposed that the courses and distances corresponded with the marks, and that the same land was described, whether by course and distance in the deed or by the marked line." *Reed* v. *Schenck*, 2 Dev., 415.

Adhering to the rule that we must look into the instrument itself to ascertain what is meant to be conveyed, and using parol evidence to fit the description to the thing described, the conclu-

sion is unavoidable; and so the jury should have been charged, that the plaintiff's deed embraces the lots as originally laid out, and the province of the jury was simply to ascertain where those lines were, and whether they take in the disputed part.

For the error pointed out, the verdict must be set aside and a new jury ordered, and it is so adjudged.

Error. *Venire de novo.*

R. F. PHIFER and others v. PAUL BARNHART, Ex'r, and others.

Injunction— Unregistered Deed, what it conveys.

1. In injunction, the court will require the party seeking relief to make a full discovery of the facts and use perfect candor in alleging them.
2. The bargainee in an unregistered deed has a legal title, which, though incomplete, cannot be defeated by the mere act of the bargainor in executing another deed to a third party, without notice, and whose deed is registered.
3. Although such deed cannot be given in evidence until registered, and does not therefore convey a perfect legal title, yet, when registered, it relates to the time of its execution, and the title becomes complete.

(*Morris* v. *Ford*, 2 Dev. Eq., 412; *Walker* v. *Coltraine*, 6 Ired. Eq., 79; *Wilcox* v. *Sparks*, 72 N. C., 208; *Smith* v. *Turner*, 4 Ired. Eq., 433; *Hodges* v. *Spicer*, 79 N. C., 223; *Beaman* v. *Simmons* and *Hare* v. *Jernigan*, 76 N. C., 43 and 471, cited and approved).

MOTION for injunction, in an action pending in CABARRUS Superior Court, heard at Chambers on the 10th of October, 1882, before *Graves, J.*

The motion was heard upon *ex parte* affidavits, and an injunction granted until the trial, and the defendants appealed.

Messrs. Wilson & Son, for plaintiffs.

Messrs. Fowle & Snow and *Paul B. Means,* for defendants.

RUFFIN, J. In causes of this nature it is the duty of this court to consider, not only the law governing the case, but the evidence, and to ascertain the facts. Looking to the weight of the testimony, we conceive the following facts to be established:

In 1857, Daniel Barnhart being seized of a tract of land situate in Cabarrus county and known as the "Old Barringer Place," and which was traversed by what were supposed to be two valuable gold veins, executed a deed, whereby he conveyed the said two gold veins, together with one hundred feet of land on each side thereof, and the privilege of ingress and egress, to C. H. White, Caleb Phifer and George Phifer—the said bargainees being the ancestors of the plaintiffs upon whom their rights have descended.

The said Daniel died in 1879, leaving a last will, wherein he directed his executors to sell the said tract of land, and divide the proceeds amongst his seven children, who, or their heirs, are the defendants in this action.

At the time of his death, the said Daniel was quite an old man, and for some years previous thereto had been laboring under paralysis, whereby his mind was enfeebled.

In 1877, he contracted to sell the said land, without excepting the mineral interest, to one W. A. Smith for the sum of four thousand dollars, but just before his death the said Smith prevailed with him to modify their contract, and to accept two thousand dollars from him for the land, and to convey it to one Meares, to whom Smith had contracted to sell it for four thousand dollars. This was done, and the said Meares paid one half the amount in cash and gave his note for the other half, to-wit, two thousand dollars, to Smith's wife, and gave a mortgage upon the land to secure this latter sum.

After the death of said Daniel, his executors and devisees instituted an action against Smith and wife, and Meares, wherein they consented to ratify his said sale to Meares, notwithstanding his infirmity, but alleged, as a gross imposition upon him, their inducing him to accept half of the consideration actually paid,

and it was finally so adjudged in that action; and the sum secured in the note to Mrs. Smith was directed to be paid (and it has been paid) into office for the benefit of the devisees, the defendants in this action.

Smith had been entrusted by the plaintiffs with the deed to their ancestors for the purpose of having it registered, and while negotiating for the sale and conveyance of the land to Meares, he caused the same to be proved before the clerk, but afterwards removed it from the office so that its registration was never completed. Meares had notice of this deed at the time of his purchase, consulted counsel with regard to it, and was advised that it passed no title to any one.

The plaintiffs aver that he has the deed now in his possession, and as his whereabouts is unknown to them, the deed is thereby lost to them; that they are informed that he has sold the land to parties who had no notice of the rights of the plaintiffs in the premises; that exclusive of the minerals, and for agricultural purposes alone, the land is not worth more than fifteen hundred dollars, and they say they are advised that they are entitled to have the difference between that sum and the price agreed to be paid for the land, as representing the value of the minerals—they offering to ratify the sale thereof to Meares or his grantee.

They also aver, that the defendants are all insolvent, and therefore ask that they may be enjoined from receiving any part of the fund paid into court, until the plaintiffs can establish their rights in the premises, which they undertake to do in this action.

As we understand the statement of the plaintiffs' case, and the argument of their counsel, they rest their right to the relief asked upon the notion, that they are now precluded from asserting their claim to the property itself, and this, in turn, rests upon the proposition that the bargainee, in an unregistered deed for land, takes but a bare equity, which may be absolutely defeated,

provided the bargainor should subsequently convey the land to another without notice of the prior instrument, and by deed registered.

The first objection which suggests itself to the equity of the plaintiffs as thus stated, is, that the evidence taken in the cause fails to establish it. Confessedly, Meares had full notice of the existence of their deed at the time he made his purchase of the land, and there is no satisfactory proof whatever that he has sold it to any one, or that his alienee, if there be such, was kept in ignorance of the plaintiffs' prior claim. There is, it is true, in one of the affidavits filed by the plaintiffs, a general allegation to the effect that they have been informed and believe such to be the case. But these are grave matters, involving the rights of parties to property, and should not be determined upon the mere impressions and belief of parties. They are expected, and indeed, required, to inform themselves diligently of the real facts of the case, and to state them with such precision as will enable the court to act upon them intelligently.

With no sort of propriety can the plaintiffs ask the court solemnly to adjudge between the defendants and themselves, upon the footing that Meares has parted with his title in a certain condition, when it may turn out that he has not parted with it at all.

By the use of the smallest degree of care, they could have known certainly, and so informed the court, whether any deed from Meares, purporting to convey the land to another, had been proved and registered in the proper office of the county, and thereby enabled us to know whether the title, which they profess to dread, really stands upon any higher ground than their own.

When we consider the improbability, not to say the impossibility, of their having that degree of information in regard to the matter which they have seen fit to disclose, without at the

same time having more accurate and minute information, we cannot avoid an impression that they are not dealing frankly in the matter.

There is, moreover, the same lack of diligence in connection with the non-production of the deed under which they claim, and the same apparent want of candor in setting out its provisions, and especially its description of the property intended to be conveyed. So far as is disclosed in the case, not a step has been taken or an effort made to secure its production, or even a copy to be used in evidence; but the parties content themselves with merely saying that Meares has it in his possession, and as he is a non-resident and his whereabouts is unknown, they consider it as lost to them.

The plaintiff, Archibald, whose affidavit was taken, admits that he once had the paper in his custody, after he had acquired his interest in the land, and should therefore accurately know its exact contents, and in law is presumed to do so. Their other witness, Smith, between whom and themselves there manifestly exists a common understanding of some sort, if not a community of interest, had full opportunity to acquaint himself with its terms; and yet, the only account of the matter given by either of these witnesses is the general one that it purported to convey the two gold veins, known to traverse the land, to the grantees named. When it was alleged, as it was in the affidavits of the defendants, that the instrument was wholly inoperative, as a deed, because of the uncertain description of its subject-matter, and that on this account it had been twice condemned by learned counsel, it plainly became the duty of the parties, in justice to the court, accurately and minutely to set out its details, and particularly to say whether the description of the interest conveyed was the same as that contained in the imperfect deed from the assignee to the plaintiff, Archibald.

When called upon to lend extraordinary relief to parties, the court has a right to look for full discovery and perfect candor on their part. It is by their non-observance of this rule that

the plaintiffs in this action have put themselves and their cause at some disadvantage before the court.

We do not care, however, to put our decision upon grounds personal to the plaintiffs, as we are convinced there is an error in the premises assumed by them, and upon which they have attempted to build their equity.

While many of the judges have spoken of the estate which the bargainee in an unregistered deed takes in lands, as an equity, and of the instrument itself as an executory contract, we are aware of no authority for the position that the estate thus created can be displaced, or defeated, by the mere act of the bargainor in making another conveyance to a third party without notice, and whose deed may be registered. On the contrary, whenever the question has been the subject of consideration by the court, as it has been more than once, its decisions have been uniformly inconsistent with any such idea.

In *Morris* v. *Ford*, 2 Dev. Eq., 412, it is said, that such a bargainee, after the execution of his deed and before its registration, has not a mere equity in the land: he has an equity and an incomplete legal title, which will become *a perfect legal title from the time of the execution of the deed*, whenever the registration shall take effect; and it was added that, even before the enrolment of the deed, he was tenant of the freehold and therefore a recovery under a *præcipe* against him would be good.

Again, in *Walker* v. *Coltraine*, 6 Ired. Eq., 79, it was declared to be an error to say that an unregistered deed confers only an equity; that it is a legal conveyance, which, although it cannot be given in evidence until registered and therefore is not a perfect legal title, yet has an operation as a deed from its delivery; and it was emphatically said, that the ignorance of such a title in one, who might afterwards buy the land, could not impair it.

In *Wilcox* v. *Sparks*, 72 N. C., 208, Mr. Justice READE, speaking for the court, says, that although a deed cannot be used to support a title until it is registered, still when registered it

relates, and passes the title, as of the time of its execution, just as letters of administration relate to the death of the intestate.

In *Smith* v. *Turner*, 4 Ired. Eq., 433, the facts were that the father of the plaintiff conveyed certain land to one Jones, who devised it to the plaintiff. The conveyance being lost and unregistered, a judgment creditor of the father had the land sold and it was purchased by the defendant; *Held*, that the plaintiff had a clear right to call for a conveyance from her father or from the defendant as having succeeded to the legal title; nor was the decision put upon the ground that the defendant, being a purchaser at an execution sale, was affected with the plaintiff's equity.

Equally plain are the rights of these plaintiffs. A court of equity will compel Meares, or whosoever else may withhold their deed from registration, to produce it for that purpose, or, if it has been destroyed, will require the heirs of the grantor to make another in its place, which, when registered, will relate to the execution and delivery of the first deed, and so clothe them with a title dating from that time, perfect in itself, and overlapping all intermediate conveyances. *Hodges* v. *Spicer*, 79 N. C., 223.

The authorities referred to are not in conflict with the decisions in *Beaman* v. *Simmons* and *Hare* v. *Jernigan*, 76 N. C., 43 and 471, and other cases in which it is held that, if an unregistered deed be voluntarily destroyed or cancelled under a parol agreement between the grantor and grantee, the effect will be to restore the whole estate to the former, freed from all claim of the latter. These later cases have certainly introduced a new principle into our law, which we are not disposed to push beyond the point to which it has already gone. They proceed upon the ground that, so long as the deed remains unregistered, it amounts to an executory contract merely between the parties, which they may annul by mutual agreement, though in parol; and as in such case the legal title is already in the grantor, it continues to abide with him cleared of the equitable estate of the grantee.

The plaintiffs, however, seek to carry the principle far beyond this point, and would have us hold that by their own assent,

unparticipated in by any one, they can determine their estate in the land and cast it upon those who may now hold the legal title, and demand to be paid its price.

With a full knowledge of the claim of the plaintiffs, such as it is, Meares contracted with the ancestor of the defendants, and agreed to pay him four thousand dollars for the land. In making this contract the parties did not, and could not, impair the title of the plaintiffs, and there is nothing therefore for the latter to ratify. If disposed to assert their claim to the minerals imbedded in the two veins traversing the land, the courts are open to them, and will aid them so far as to compel the production of their deed for registration, or, if destroyed, will cause its place to be supplied by another; but cannot help them to any part of the fund in question, because they have given nothing for it.

The court is of the opinion that the injunction was improvidently granted in this case, and the order to that effect is therefore reversed and the injunction dissolved. This will be certified to the end that the parties may proceed as they may be advised.

Error. Reversed.

CALVIN J. COWLES v. SMITH W. COFFEY.

Deed of Sheriff—Possession under color of title.

1. A sheriff's deed, made in pursuance of an execution sale, operates from the day of the sale, not from the date of the deed.

2. In such case, the purchaser, being clothed with the legal title from the day of sale, is also subjected to the consequences attending a possession, under color, held adversely to him.

(*Hoke* v. *Henderson*, 3 Dev., 12; *Dobson* v. *Erwin*, 4 Dev. & Bat., 201; *Flynn* v. *Williams*, 7 Ired., 32; *Davidson* v. *Frew*, 3 Dev., 3; *Testerman* v. *Poe*, 2 Dev. & Bat., 103; *Presnell* v. *Ramsour*, 8 Ired., 505; *Woodey* v. *Gilliam*, 67 N. C., 237; *Dobson* v. *Murphy*, 1 Dev. & Bat., 586; *Pickett* v. *Pickett*, 3 Dev., 6, cited and approved).

EJECTMENT tried at Spring Term, 1882, of WATAUGA Superior Court, before *Avery, J.*

This action was begun on the 22d day of March, 1877. It is brought to recover the possession of land the title of which is claimed by both parties, as derived under one D. C. McCanless.

The plaintiff claims under a judgment and execution against the said McCanless and a sheriff's deed conveying the land as his property. The sale took place on the 16th day of November, 1859, one Deal being the sheriff of the county. The plaintiff was the purchaser, but took no deed at the time; nor until the 6th day of May, 1876, when he procured it to be made by the said Deal, who was still a resident of the county, though out of office.

In support of his title, the defendant offered in evidence a deed purporting to convey the same land from the said D. C. McCanless to J. L. McCanless, dated January 6th, 1859; also a deed from J. L. McCanless to John Horton, dated the 1st day of March, 1859, and a deed from Horton to himself, dated the 1st day of March, 1877. He also offered evidence tending to show that he, and those under whom he claims, had held continuous and adverse possession of the land from the first deed in 1859.

The plaintiff insisted that the deeds from D. C. to J. L. McCanless, and from the latter to Horton, were both made with the intent to defraud the creditors of the first grantor. This was denied by the defendant, who also insisted that, even conceding the deeds to have been fraudulently made, they still constituted color of title as against the plaintiff from the date of his purchase in 1859, and had ripened into a title under the statute of limitations. This, in turn, was disputed by the plaintiff, who contended that those deeds, being fraudulent, began to operate as color of title only from the time he procured his deed in 1876.

Under instructions given them by the court, the jury found the issues in favor of the plaintiff, and specially that the two

deeds above mentioned were fraudulent. After judgment against him the defendant appealed.

No counsel for plaintiff.
Mr. A. S. Merrimon, for defendant.

RUFFIN, J. It is the well settled law of this state, that a fraudulent deed is void to all intents, as well when attempted to be set up as color of title, as when offered as title itself, and that no length of possession under it will have the effect, under the statute of limitations, to bar a creditor of the grantor. *Hoke* v. *Henderson*, 3 Dev., 12; *Dobson* v. *Erwin*, 4 Dev. & Bat., 201; *Flynn* v. *Williams*, 7 Ired., 32.

The same authorities are direct also to the point, that so soon as a sale by a creditor under an execution takes place, then such deed, though previously inoperative, begins to operate as color of title, and will ripen into a good title if seven years of uninterrupted adverse possession be thereafter had under it.

The principle upon which these decisions go, is, that the statute of frauds makes the whole contract between the fraudulent grantor and grantee void as against the creditor, so that the possession of the one is the possession of the other, and therefore cannot be adverse to the creditor. But, when the sale by the creditor occurs, there is no such confidence or privity between the purchaser and the grantee, and the possession of the latter then becomes adverse.

So much, as we understand from the case, was conceded by both counsel in the court below, and the only contention between them seems to have been, whether in this particular case the deed should begin to operate, and the statute begin to run against the plaintiff, from the date of the sheriff's sale in 1859, or from the time he procured his deed in 1876. This question, we conceive, to have been settled in principle by a series of decisions in this court.

In *Davidson* v. *Frew*, 3 Dev., 3, it was held that a sheriff's

deed, whenever made, relates to the sale, and from that time vests the title in the purchaser, so as to defeat any intermediate transfer or incumbrance by the debtor; and this rule was followed, without question in *Testerman* v. *Poe*, 2 Dev. & Bat., 103; *Presnell* v. *Ramsour*, 8 Ired., 505; *Woodley* v. *Gilliam*, 67 N. C., 237.

So completely was it recognized in *Dobson* v. *Murphy*, 1 Dev. & Bat., 586, that the court held that the sheriff's deed, made seventeen years after the date of his sale, had such relation to the sale, and was so intimately connected with it, as that it would operate as color of title retrospectively, and give effect to possession taken at that time. It was likened to the case of a bargain and sale which must be registered before it can have any effect, but if registered, gives title or color of title, as the case may be, from the day of its delivery.

From these authorities, it would seem to follow as a necessary deduction in our case, that the two deeds held respectively by J. L. McCanless and Horton, begun to be color of title, and to be susceptible of maturing into a valid title, as against the plaintiff, from the date of his purchase in 1859. If, when subsequently obtained, his deed should have relation to the sale for any purpose, and when to his advantage, it must do so for all purposes, and though to his disadvantage. He cannot be permitted to enjoy its benefit in clothing him with the legal title from that day, without subjecting himself to the consequences attending an open and notorious possession held adversely to him.

But we are not left to mere inference in regard to the law on this point. In *Pickett* v. *Pickett*, 3 Dev., 6, the very question arose, and there was then a direct adjudication upon it. It was declared by the court, that the possession of a fraudulent donee became adverse to the purchaser under an execution in favor of a creditor of the donor, from the moment of the sale by the sheriff; and that what then became color of title, in such donee, had become title itself, even before the purchaser had taken his deed from the officer. It was said to be unnecessary to specu-

late as to where the legal title was in such case; that it was somewhere; and wherever it might be, the open possession of another under a distinct title must be treated as being adverse to it.

The plaintiff in this action acquired, by his purchase in 1859, an inchoate title to the land in dispute, which neither his debtor nor his fraudulent grantee could have defeated. It was his duty—as the law furnished him the opportunity to do—to have perfected that title by taking a deed from the sheriff, and his folly not to have done so. There can be no reason why he should not have been expected to complete and enforce his title, such as it was, in the same time that is prescribed for all other claimants, and his failure to do so is attended with the very mischiefs which it is the purpose of all statutes of repose to avoid.

For the reason that His Honor failed to instruct the jury as to the time when the statute began to run in favor of the defendant, this court thinks he is entitled to a *venire de novo*, and this makes it unnecessary to determine his other exception.

Error. *Venire de novo.*

R. W. WHARTON, Adm'r, v. S. S. EBORN and others.

Deed, latent and patent ambiguity—Parol evidence—Notes and Bonds—Usury.

1. Parol evidence is admissible to fit the description contained in a deed to the land, where the ambiguity is latent; otherwise, where it is patent.
2. To avoid a bond on the ground of usury, it must be shown to have been illegal *ab initio;* for if good in its creation, it cannot be avoided by any subsequent usurious agreement.

(*Capps* v. *Holt*, 5 Jones' Eq., 153; *D. & D. A.* v. *Norwood*, Busb. Eq., 65; *Hilliard* v. *Phillips*, 81 N. C., 99; *Massey* v. *Belisle*, 2 Ired., 170; *Dickens* v. *Barnes*, 79 N. C., 490; *Moore* v. *Hylton*, 1 Dev. Eq., 429; *Rhodes* v. *Fullenwider*, 3 Ired., 415; *Cobb* v. *Morgan*, 83 N. C., 211, cited and approved).

WHARTON *v.* EBORN.

CIVIL ACTION to foreclose a mortgage, tried at Fall Term, 1882, of BEAUFORT Superior Court, before *Gilliam, J.*

The defendants appealed.

Mr. C. F. Warren, for plaintiff.

Mr. Geo. H. Brown, Jr., for defendants.

RUFFIN, J. This action is brought to foreclose a mortgage, which was given by the defendant, Rowland, to the plaintiff's intestate (D. M. Carter) on the 28th day of May, 1873, to secure a certain debt due by a bond bearing even date with the deed, and payable on the 1st day of June, 1874—the same being registered on the 31st of May, 1873.

In the deed, the land was described as being "a certain parcel of land situate in Beaufort county, in Bath township, on the east side of Bath creek, and on Reedy branch, adjoining the lands of W. L. Tyre, Henry Ormond, and the lands formerly belonging to B. W. Hodges, and containing one hundred and forty acres, it being the same land conveyed by John W. Earle to said Rowland by deed dated May 28th, 1868."

The defendants, Samuel and Benjamin Eborn, have since purchased the land of Rowland, and they allege that they were misled into doing so by the insufficiency of the description contained in the deed, not knowing that it affected the land now sought to be sold, and at the trial they insisted that the deed was void because of the uncertainity in this particular.

For the purpose of identifying the land, the plaintiff introduced as a witness a surveyor, who testified that he had surveyed the lines of the adjoining lands, and knew the tract from hearing its description read from the deed; that no other tract in the county would fit the description given; and that it could not be more accurately described, except by giving its actual metes and bounds. The reception of this testimony was objected to by the defendants, and constitutes the subject of their first exception.

The plaintiff offered in evidence another paper-writing under seal, executed by the defendant, Rowland, on the 4th day of March, 1876, whereby in consideration of the forbearance, on the part of the plaintiff's intestate, to collect the debt secured in the mortgage, by foreclosing the same, he promised to pay him interest thereon at the rate of eight per cent. per annum (the former rate being six per cent.) and to compound the same annually until paid. The defendants insisted that the effect of this agreement was to take away from the plaintiff the right to have any interest upon his debt, and asked the court so to rule, which, however, was refused by the court, and this is the subject of their other exception.

1. If there is any ambiguity in the description of the land, as contained in the deed to plaintiff's intestate, it certainly is not patent upon the face of the instrument. For aught that can be seen from barely reading the paper, it may contain an accurate and complete description of *some* land. If, then, without adding to the terms of the deed, the description can be made, by extrinsic evidence, to fit the particular land in controversy, it is admissible according to all the authorities to do so. *Capps* v. *Holt*, 5 Jones' Eq., 153; *Deaf and Dumb Asylum* v. *Norwood*, Busb. Eq., 65; *Hilliard* v. *Phillips*, 81 N. C., 99. Indeed, it is oftentimes necessary to resort to such evidence, even where the most accurate and minute description is made use of in conveyances.

The case meets fully every requirement of the rule as laid down in *Massey* v. *Belisle*, 2 Ired., 170, and *Dickens* v. *Barnes*, 79 N. C., 490, that every deed must set forth a subject matter, either certain in itself, or capable of being reduced to certainty by a recurrence to something extrinsic, to which the deed refers, since, according to the testimony of the surveyor, the terms used indicate to one acquainted with the water-courses, and the adjoining tracts called for, the very land in question, and could not be made applicable to any other whatsoever.

The authorities cited by plaintiff's counsel in answer to defen-

dants' second exception, are likewise conclusive. To avoid a bond, as being usurious, it must be shown to have been illegal *ab initio*. For if good in its creation, it cannot be avoided by any subsequent usurious agreement. *Moore* v. *Hylton*, 1 Dev. Eq., 429; *Rhodes* v. *Fullenwider*, 3 Ired., 415; *Cobb* v. *Morgan*, 83 N. C., 211.

There is no error, therefore, and the judgment of the court below must be affirmed.

No error. Affirmed.

JAMES RADFORD v. C. W. EDWARDS.

Deed—Description of Land.

A deed (or bond for title as here) as follows: "For fifty acres of land situate and lying on the head-waters of Elk Shoal creek as far as the waters of Radford creek, to interfere with no land before sold"; *Held*, that the description is not sufficient to admit parol evidence to identify the land.

(*Dickens* v. *Barnes*, 79 N. C., 490; *Farmer* v. *Batts*, 83 N. C., 387; *Scott* v. *Elkins*, *Ib.*, 424; *Gudger* v. *Hensley*, 82 N. C., 481, cited and approved).

EJECTMENT tried at Fall Term, 1882, of YANCEY Superior Court, before *Avery*, *J.*

Defendant appealed.

Messrs. Battle & Mordecai, for plaintiff.

Mr. J. M. Gudger, for defendant.

SMITH, C. J. In the year 1832, John Gray Blount owned, as did Robert Love and James R. Love in the year 1840, a large tract of land within whose boundaries lies that in dispute, which, the two latter in the year last named, conveyed to Thomas Gardner in a deed containing this reservation: "Not to interfere with

any lands heretofore sold which are excepted." Thence the plaintiff deduces his title to the land of which that contested and claimed by the defendant forms a part.

On August 9th, 1832, John Gray Blount, then the owner, by his agent, James R. Love, entered into a contract with Stephen Parker and gave him a bond in which he covenanted, on payment of the purchase money, to execute to him "a deed of conveyance for fifty acres of land, situate and lying on the head-waters of Elk Shoal creek, as far as the waters of Radford creek, to interfere with no land before sold." This bond was subsequently assigned to the defendant.

The contention of the defendant is that the land mentioned in the title bond, having been previously sold by Blount while owner of the whole, is not embraced in the descriptive words used to designate the subject matter of the conveyance to Thomas Gardner, but constitutes a part of the reservation, and hence does not pass under that deed, but belongs, at least the equitable estate therein, to the defendant.

The sole inquiry, then, is as to the sufficiency of the description contained in the bond to identify and define the land, so as to bring it within the exception of "*any lands heretofore sold*," in the deed of Robert and James R. Love.

Upon the question of location, a plat, of which a copy accompanies the transcript, was introduced, showing the position of the two creeks mentioned in the bond, over the intervening space between which the land was attempted to be placed, in figures nearly or quite square, its opposite sides reaching to the creeks. The description does not give the shape, but only the area of the land, and two natural objects which it touches; and as these do not communicate with each other, and the length of the boundary not given on either, and nothing whatever said about the manner of running from one to the other, it is manifest that the land cannot be definitely located, and the description is two vague and defective to be fitted to any place.

The court accordingly instructed the jury that "if the descrip-

tion in the bond to Stephen Parker was upon its face so uncertain that a specific performance could not be enforced, and parol proof was admissible to locate it, the defendant had offered no testimony upon which the jury can find that the bond covers the land in dispute." To this charge the defendant excepts, and it is the only point presented in his appeal.

If there is any error in the ruling, it is in permitting any evidence to be heard in aid of the manifest imperfect description, and not telling the jury it was in law incapable of being applied to any land. Of this the appellant cannot complain in being allowed to make the attempt to locate.

As land, unless it has, as a tract or lot, acquired a name to distinguish it and by which it is known, can only be ascertained by boundary lines, and separated from all other, the necessity of identifying by a description which admits of a definite location is obvious; and where this cannot be done, no title to it as a distinct portion can pass by the deed or written instrument, the sole office of parol evidence being to fit the description to the thing described and not to add to the words of description. Further, the description in connection with the established rules of interpretation must constitute an enclosing boundary.

In *Dickens* v. *Barnes*, 79 N. C., 490, it is held that a deed for land, describing it as "one tract of land lying and being in the county aforesaid, adjoining the lands of John I. Phelps and Norfleet Pender, containing twenty acres, more or less," was inoperative even as color of title, and the insufficient designation could not be aided by parol. *Farmer* v. *Batts*, 83 N. C., 387.

Recurring to our own case, it may be asked how can the surveyor find a starting point on either creek? And if he could, how far, if he pursues the course of the creek, is he to run, and where stop for a corner? In what direction will he go thence to the other creek, and where find a corner there? And how will he get back to the assumed beginning? These inquiries find no solution in the instrument, and the runnings must be wholly arbitrary in order to ascertain where the fifty acres lie. There is not furnished even any *indicia* of the form of the land; and if form

were given, the locations could be made indefinite in number, and all fulfilling equally the conditions and requirements of the language of the bond.

We therefore sustain the rulings of His Honor that no equitable estate is created, under the contract, in any distinct and separate parcel of land, to remove it from the operation of the deed to Gardner, and the judgment must be affirmed. *Gudger* v. *Hensley*, 82 N. C., 481; *Scott* v. *Elkins*, 83 N. C., 424, and cases cited.

No error. Affirmed.

JOSEPH B. BATCHELOR and others v. BENJAMIN F. WHITAKER and others.

Deed—"Heirs"—Partnership—Equity—Executors and Administrators.

1. The rule that requires the annexing of the word "heirs" to the name of the grantee in order to pass a fee, is firmly established and must be enforced. Here, there are no conveying words to which the word "heirs," contained in the warranty clause, can be transferred.
2. Where a firm, or tenants in common, acquire an estate for the life of the bargainor, one member of the firm or one of the tenants in common may purchase the reversion in fee and hold the same to his sole and separate use, where the facts, as in this case, do not establish an equity in favor of the others.
3. The law in force, at the time of the death of the ancestor, was, that an undevised estate held by a decedent for the life of another, should be personal assets in the hands of the personal representative. Rev. Stat., ch. 46, § 22.

(*Stell* v. *Barham*, 87 N. C., 62, cited and approved).

CIVIL ACTION tried at Spring Term, 1882, of HALIFAX Superior Court, before *Bennett, J.*

The plaintiffs appealed from the judgment of the court below.

Mr. E. G. Haywood, for plaintiffs.
Mr. R. O. Burton, Jr., for defendants.

SMITH, C. J. On September 23, 1842, John H. Bradley, by deed of that date, conveyed to the defendant, Francis A. Smith, in trust to secure and provide for the payment of certain debts therein specified, four slaves and other personal estate, and also, in the language of the bargainor, "all my right and interest to a tract of land lying near the depot, Enfield, and I, John H. Bradley, do agree to warrant and defend the right and title to the said property, to him the said F. A. Smith, to him and his heirs and assigns, against the claims of myself and all others."

The trustee thereafter and pursuant to the terms of the deed, and before 1845, advertised and sold the property—the slaves and interest in the land being bid off by the partnership firm of Batchelor & Whitaker, constituted of James W. Batchelor and L. H. B. Whitaker, and so entered by the trustee in a small memorandum book in which are contained the names of the purchasers, the price bid, and the property sold. This book has been lost, and the entry is recalled from the memory of the trustee. The said firm undertook to discharge the secured debts out of the purchase money due from them, and in consequence no conveyance of title to the land has been made.

James W. Batchelor died in November, 1850, leaving a will in which he appoints the plaintiff, Joseph B. Batchelor, his son, executor; and the surviving partner died in 1865, having also made his will wherein he nominates the defendants, James H. Whitaker and Benjamin F. Whitaker, executors. The bargainor, Bradley, has also since died.

On June 21, 1858, Joseph B. Batchelor, acting in his capacity as executor, and the said L. H. B. Whitaker entered into an agreement in writing and under their respective hands and seals, in which, after a recital of the partnership relations subsisting under different names between the testator and the survivor, and the large business conducted by them and the difficulty of arriv-

ing at a correct settlement owing to the loose manner in which their books were kept, and in order to an adjustment, covenants are mutually entered into in these words:

"The said Joseph B. Batchelor, having on the 10th of January last paid to John Beavans, one of the creditors of the said firm, the sum of five hundred dollars, and agreeing to pay to James D. Perkins a debt due to him of about one hundred and five dollars, doth agree, release, and discharge the said L. H. B. Whitaker from all claim or liability to him on account of the said firm above named, or from the payment made or agreed to be made for the same. And the said L. H. B. Whitaker, in consideration of the payment heretofore made to the said John Beavans, and herein agreed to be made to the said James D. Perkins, doth hereby agree and bind himself to pay and discharge all other debts still outstanding against the said firm, and to refund and pay to the said Joseph B. Batchelor, as executor aforesaid, any sum which he may hereafter be compelled to pay towards, or on account of the same, and doth hereby release and discharge the said Joseph B. Batchelor, as executor, from all claim or liability on account of the said firm, or any matter arising thereon, and from any liability on account of the payment herein agreed to be made to him. In witness wereof, &c."

The present action is brought by the plaintiffs, alleging themselves and admitted to be the heirs-at-law of James W. Batchelor, against the defendants, who, except the defendants F. C. Whitaker, F. Smith and J. A. Collins, husband of defendant, Mary Collins, are in like manner alleged to be, and are, the heirs-at-law of said L. H. B. Whitaker, and its object is a partition of so much of the land bought at the trustee's sale as lies on the east side of the Wilmington & Weldon Railroad, the portion lying on the west side having been surrendered to one Parker, who claimed to own an equal moiety with the said Bradley; and if necessary, a sale for the purpose of division.

The defendant, Smith, submits to make the title, recognizing

the force of his contract of sale, and has deposited a deed to be delivered accordingly.

The complaint asserts that a fee simple is conveyed in the deed in trust, and if not, was so intended; and that the conveyance of the reversionary estate afterwards, to-wit, on February 1, 1856, by said John H. Bradley to said L. H. B. Whitaker in fee, enures to the benefit of both partners, and converts the estate, if defective in the trustee, into an estate of inheritance for the equal advantage of all the alleged tenants in common.

The exceptions taken during the trial, and not presented in the foregoing statement, are to rulings that relate to the character and legal consequences of the possession held by the said L. H. B. Whitaker, and his successors in estate, and whether it is adversary, so as to bar the rights of the plaintiffs who claim to be tenants in common, holding one moiety among them.

The issues and the jury-responses thereto, to which the exceptions refer, are not important in the view we take of the case, since the result will not be affected by the verdict rendered on them, if favorable to the plaintiffs.

The questions presented in the complaint and the plaintiffs' own showing, to be first decided, are:

1. Does the deed in trust convey an estate of inheritance, or for the life of the trustee? and,

2. If the latter, have the plaintiffs any estate or interest in the land held by the defendants, as tenants in common with them?

The plaintiffs have not submitted an issue as to the alleged mistake in giving form to the deed to the trustee, looking to such reformation of its terms as shall make it conform to the intent of the parties and convey a full estate; and we must therefore consider the case as calling on us to interpret the instrument, as drawn, and to ascertain and declare its legal operation.

We have so recently had occasion to consider the general subject of conveyances of land, *inter vivos*, defective for the absence or displacement of inheritable words and the application of rules of construction in their aid, as to render necessary only a refer-

ence to the case of *Stell* v. *Barham*, 87 N. C., 62. The rule that requires the annexing of the words "heir" or "heirs" to the name of the grantee in order to pass the fee, though technical, is firmly established in the law and fully recognized in our adjudications, and must be enforced until the law-making power shall choose to dispense with its use in such conveyances.

The present deed, by no reasonable construction, can enlarge the life estate vested in the grantee into an estate of inheritance, and is governed by the ruling in the case cited. We will simply advert to the phraseology found in it in confirmation. 1. There are no interposed conveying words to which the terms "and to his heirs," in the concluding part of the warranty, can be transferred without violence to the manifest intention of the grantor in using them. 2. The words, if transposed, apply alike to the personal estate, where they are not necessary, as to the real estate where they are, to pass a full title.

II. The appellant contends that the conveyance of the reversion in fee, obtained by the surviving partner from Bradley in 1856, enures to the equal benefit of both, as assuring the estate intended to be sold and bought, and correcting the mistake in his former deed to the trustee. If the fact were established to be true, as assumed in the proposition, the result would seem reasonably to follow from their fiduciary relations and mutual duties. If there was an equity to have the trust deed reformed for the benefit of the purchasers at the sale by the trustee, the end would have been attained without invoking the aid of the court, and the consequence the same in either mode of correction. But no such equity is found to exist, and no inquiry made before the jury on the point. If there were no such mutual mistake, and only that interest in the land, sold and represented to be sold, which passed to the trustee under the first deed of Bradley, then the said Whitaker was free to purchase the reversion for himself and retain it for his own use, without being exposed to the claims of the heirs of his deceased associate in business.

III. Assuming a life estate alone to pass to the trustee, and waiving any objection to the parol contract of sale, which he is willing to execute, have the plaintiffs, as heirs-at-law of James W. Batchelor, any such interest or share therein as entitled them to partition, and can they maintain their action for the purpose of having it? We think very clearly they have not, and this will be apparent by reference to the law in force, at the time of the death of the ancestor from whom the plaintiffs claim, disposing of undevised estates held in land by the decedent for the life of another:

"If any person shall die seized of an estate in lands, tenements or hereditaments, for the life of another, and shall not by last will have devised the same, and the said estate shall not have come to the heir or heirs-at-law of the tenant for life by special occupancy, then the said estate shall vest in the executors or administrators of the tenant for life; and if any *cestui que trust* shall die leaving any equitable interest in any estate, real or personal, which shall come to his executors or administrators, every such estate in lands, tenements and hereditaments for the life of another, and every such equitable interest, shall be deemed personal assets in the hands of said executors and administrators for the benefit of the creditors, legatees and distributees." Rev. Stat., ch. 46, § 22.

The surviving partner held the entire life estate for the purpose of meeting, if necessary, the liabilities of the firm that devolved upon him, and only when they were discharged could the proper representative of the deceased partner be entitled to claim a share therein. The partnership matters had not been settled and closed when the covenants for an adjustment and release were entered into by Whitaker and the executor of Batchelor, since subsisting and unsatisfied debts are expressly mentioned and provided for in the instrument. Assuming, however, that the settlement had been effected before the institution of the present suit, and without making any disposition of the interest in the land possessed by the firm, the interest of the

deceased partner, whether legal or equitable, passed to the executor as personal property, and not to his heirs-at-law. They have, and can assert, no title or interest acquired by descent in the life estate, and the executor would be debarred from doing so by his surrender and release to the living and accountable partner under their mutual covenants with each other.

IV. It may be urged, however, that while no deed has been made previous to the suit by the trustee, it may now be put in a form giving to the life estate an inheritable quality, authorizing the heirs to take as special occupants under the statute, and thus the plaintiffs can maintain the action. But the defendants have an equal right that the conveyance shall be simple and without inheritable words, and neither can have the deed so drawn as that, by a retrospective operation, it can confer a cause of action that did not exist when the suit was brought, or defeat a cause of action that did then exist. It is sufficient to say, as the case stands, there was no right, to sue for the land, vested in the plaintiffs and shown in the facts in proof, when they began their suit, nor since, up to the present time. A simple assignment, such as would pass the personal property and the life estate, would give the absolute property in both to the partner, Whitaker, under the terms of his settlement with the executor: an assignment, with inheritable words annexed of the life estate, might perhaps have the effect of vesting an interest therein in the plaintiffs. As the defendants cannot demand the one, neither can the plaintiffs demand the other, to change the aspect of the case as it was and still continues to be.

It is equally plain that the change in the law (Rev. Code, ch. 38, rule 12), which imparts to estates held for life the same descendible qualities that belong to estates of inheritance, cannot modify the interests vesting in the personal representative of the testator, Batchelor, so as to transfer any to his heirs-at-law. As the *executor alone had the right* to call the survivor to an account of this estate in land, as of all other of the firm effects, so it

would still remain in him, and could be exercised but for his release and discharge.

The view we thus take dispenses with an examination of the other exceptions, since, if they were sustained, and all the issues upon which they bear were found for the plaintiffs, the obstacle to their prosecution of this action would not be removed, and this obstacle is fatal. The action must be dismissed.

PER CURIAM. Dismissed.

M. M. MURRAY and others v. HENRY S. SPENCER.

Ejectment—Deed—Boundaries—Natural objects.

1. Where a natural object (for instance a stump) is called for as the beginning corner of a tract of land, and the reputation for thirty years has pointed to that object as the corner, it is error to hold that this constitutes *no evidence* of the fact that a line beginning at that point, and corresponding with the first call of the grant, was actually run and marked.
2. Where the description in the grant calls for a marked tree and also the line of another tract, which are inconsistent, the issue is one of fact and not of law. Which description will control. *Quære.*

(*McNeill* v. *Massey*, 3 Hawks, 91; *Icehour* v. *Rives*, 10 Ired., 256; *Dula* v. *McGhee*, 12 Ired., 332, cited and approved).

CIVIL ACTION tried at Fall Term, 1882, of HYDE Superior Court, before *Gilliam, J.*

The plaintiffs appealed.

Mr. Geo. H. Brown, Jr., for plaintiffs.
Mr. W. S. Mason, for defendant.

RUFFIN, J. This is an action of trespass upon lands, in which the defendant admits having entered upon the *locus in quo*,

but claims to have the title thereto; and the case turns upon the location to be given to a certain grant known as the "Large Turner Patent."

On the 25th day of October, 1872, two grants for lands lying in Hyde county were issued to William Turner, which purported to be based upon entries and surveys made upon the same day with each other.

The smaller one (known in the case as the "former entry") conveyed to him one hundred and fifty acres, and its location was established on the trial. The larger one conveyed to him six hundred and forty acres described as "a tract lying on the west side of Juniper Bay creek, and *on back of former entry*, beginning at a marked black-gum, and running thence east, &c."

The defendant contended that this beginning corner was at a point in the northern line of the smaller grant ("former survey"), and if so it was conceded that he was not guilty of the trespass; whereas the plaintiff contended that it was at a black-gum stump found a few yards south of the point contended for by the defendant, and if so, he was guilty.

On the trial, a jury being waived, it was agreed that the court might find the facts and declare the law thereon.

For the purpose of establishing the gum as the corner, the plantiff introduced three witnesses, who testified that for over thirty years the black-gum had been reputed to be the beginning corner of the "large Turner grant," and one testified that the spot was pointed out to him as such, more than thirty years before, though at the same time he was told that another point was also spoken of as being that corner.

"This testimony," the case states, "the court found to be true, and the facts testified to to be established by the plaintiff, but held as a conclusion of law, upon these facts, that in the absence of proof of the actual running of the line from the black-gum east, at the original entry or survey, the beginning of the 640-acre Turner patent is in the northern line of the 150-acre Turner patent, and that upon these facts proved, the call for the

beginning, "back of his former entry," is not overcome by the facts found, and thus locating the larger grant, he held the defendant to be not guilty.

We are not sure that we have been able to catch the exact import of His Honor's conclusion: but we understand it to be—and so did counsel who argued the cause before us—that although satisfied by the proofs offered by the plaintiff, that for more than thirty years the black-gum has borne the reputation of being the beginning corner of the "large Turner grant," still, inasmuch as the plaintiff could not show that there was a line beginning at that point, and corresponding with the first call of the grant, actually run and marked, at the date of the original survey, he felt constrained, *in law*, wholly to disregard the circumstance of its reputation, and because the land was described as being "back of the former entry," to fix its beginning corner in the line of the smaller grant. As thus understood we cannot give it our concurrence.

In the first place, to describe one tract of land as being *back* of another does not, *ex vi termini*, imply that the two are contiguous, but may be intended as nothing more than a mere general indication of the direction in which it lies; and the probability of such being the case would be much strengthened by the fact, which is shown to exist in this case, that the two were actually surveyed at the same time and by the same surveyor. If contiguous, and more especially if one should start in the line of the other, it is difficult to believe but that, under such circumstances, some more certain testimonial of that fact would be resorted to than is contained in the patent now under consideration; and very sure it is, we think, that no such artificial weight should be given to a description so doubtful and shadowy as this, as to render incompetent and unfit to be considered by a jury contradictory evidence depending upon a long continued and well established reputation—and such we understand to be, in effect, His Honor's ruling.

But passing this by, and supposing the line of the *former entry*

and the black-gum to have been both specifically called for, then, when the two appeared not to be identical, but to be at different points, it would necessarily become a question of fact to be determined upon evidence *dehors* the instrument, as to which was the point from which the survey was actually made. Such evidence would be heard, not to contradict the deed, but to determine a latent ambiguity in the instrument itself. Such seems to have been His Honor's understanding, and hence he was willing to admit, and did admit, evidence in regard to the matter; but the error committed was, that after hearing the evidence he determined the question as one of *law*, whereas, it was purely one of *fact*. *McNeill* v. *Massey*, 3 Hawks, 91.

It was another error, too, to hold that the testimony, offered as to the reputation of the black-gum, afforded *no* evidence of the fact that it was marked as a corner at the date of the original survey. This much is implied in its very reputation as the corner, and the evidence which establishes that reputation, must, if credited, connect with it every quality necessary to make it such.

In *Icehour* v. *Rives*, 10 Ired., 256, this very point was decided, and it was held that the reputation which a certain stump has as being a corner, was, if credited, sufficient to show that the corner was there, though in fact it bore no marks, and no witness had ever seen marks upon the tree while standing; and this must of necessity be so, or else the very flow of time, which should give sanctity and security to titles, will ultimately undermine them, by destroying the perishable objects denominated as their boundaries, and removing the witnesses acquainted with their localities.

If His Honor had held the evidence in regard to the reputation of the black-gum to be unsatisfactory, and in fact insufficient to control the reference, contained in the grant, to the older survey, that would have put an end to the plaintiff's case. But to hold it as he did, to be *no evidence* of the fact sought to be established, implies that he regarded it as incompetent, and

that he did not consider it in determining the corner, because he did not feel authorized in law to do so.

It is singular that it should be so, but the point seems never to have been directly presented or decided in this state, as to which should control, a marked tree or the line of another tract, when both are called for and are found to be inconsistent. In *Dula* v. *McGhee*, 12 Ired., 332, it is incidentally alluded to, and as far as any preference is manifested, it appears to be awarded to the marked tree, as being more permanent and particular. But much, it would seem in such a case, should depend upon the character of the line called for, its age, certainty, and length, and stability of its reputation; and as it does not appear to us how the line of the former entry was established in this case, we are unable to say to which of the two incompatible descriptions precedence should be given.

For the errors suggested, the court thinks the plaintiff entitled to a *venire de novo*.

Error. *Venire de novo.*

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*SUSAN BRUNER and others v. S. H. THREADGILL, Adm'r, and others.

Evidence in land suit—Statute of Limitations—Mortgage—Trusts and Trustees.

1. Evidence of the mental condition of a deceased mortgagor, directly bearing on the inquiry whether he in his life-time consented to a sale of the land by the mortgagee, cannot be excluded upon the ground that it tends to impeach the validity of the deed.
2. Evidence of the estimated value of a lot on the opposite side of a street

*Mr. Justice ASHE having been of counsel, did not sit on the hearing of this case.

from that in dispute, is incompetent to show the value of the latter: it would introduce a new issue (the value of another lot) open to proof like the issue already before the jury.

3. The period from May 20th, 1865, to January 1st, 1870, shall not be counted to bar actions, or to presume satisfaction or abandonment of rights.

4. Mortgagee sells and conveys to one who reconveys to him; *Held*, (1) That his possession under such deed is not adverse to the mortgagor, for he was entitled to the possession upon the default of the mortgagor. (2) While a trustee cannot buy at his own sale, either directly or through an agent, yet the *cestui que trust* may elect to affirm the sale. (3) The mortgagor or his representatives, in such case, can call upon the mortgagee for an account at any time within ten years after the cause of action accrues.

(*Warren* v. *Makely*, 85 N. C., 12; *Edwards* v. *Jarvis*, 74 N. C., 315; *Hawkins* v. *Savage*, 75 N. C., 133; *Reynolds* v. *Cathens*, 5 Jones, 437; *Wittkowski* v. *Watkins*, 84 N. C., 456; *Froneberger* v. *Lewis*, 79 N. C., 426; *Patton* v. *Thompson*, 2 Jones' Eq., 285; *Brothers* v. *Brothers*, 7 Ired. Eq., 150; *Elliott* v. *Pool*, 3 Jones' Eq., 17; *Joyner* v. *Farmer*, 78 N. C., 196; *Dawkins* v. *Patterson*, 87 N. C., 384, cited, commented on and approved).

CIVIL ACTION tried at Fall Term, 1882, of ANSON Superior Court, before *Gilmer*, *J.*

Jacob Bruner, being indebted in three several notes given to George W. Willoughby for the purchase of a lot in the town of Wadesboro, described in the complaint and the subject of the present controversy, on March 19th, 1859, in order to secure the same, conveyed said lot by deed of mortgage to said Willoughby with a power of sale to be exercised in default of payment after a day intended to be fixed in a blank left for that purpose, but not filled up before execution and registration.

On the 21st day of May, 1866, under the advice of counsel that the omission to designate the time could not prevent a decree of foreclosure and sale on application to the court of equity, the mortgagor executed under seal a written instrument wherein it is recited that it was the intention of the parties to insert in the blank, as the day of default after which the land might be sold, the 1st day of January, 1861, and it should have been so specified. This writing, witnessed by counsel, was proved and admit-

ted to registration on November 16th, 1882. The mortgagor was, at the time of his assent to the sale, in great mental and bodily distress, suffering from a malady of which he soon afterwards died.

On December 1st, 1866, after due advertisement, the lot was offered at public sale and bid off at the price of $625 by one William H. Redfern (who acted as the auctioneer) for the mortgagee, under a previous arrangement that he should do so, made between them. The lot was then conveyed by said Willoughby to Redfern and by the latter reconveyed to the former on December 6th, 1866, for the recited consideration of $650, though no money was paid or received by either in carrying out their previous understanding and agreement.

Under the mortgage deed the mortgagor was to remain in occupation of the premises, as did he and his family, until the sale and up to January 1st, 1867, when Willoughby took and has held possession ever since, using it as his own. At this date the plaintiffs, the children and issue of deceased children of the said Bruner, then living, the heirs-at-law upon whom by their father's death and intestacy his equity of redemption descended, were all but one under the age of 21 years, their respective ages ranging from 22 to 6 years.

This action, commenced on March 28th, 1878, against the mortgagee, and upon his death revived against the defendants, his administrator, widow and only heir-at-law and the husband of the latter, has for its object a judgment annulling the deeds by which the mortgagee claims to have acquired an absolute estate, declaring the mortgage deed still in force, and the defendants to hold the lot on the trusts therein declared, and for all proper accounts to be taken in order to ascertain what is due under the mortgage and for leave to redeem.

The jury find upon issues submitted to them, in addition to the facts already stated, that the lot when sold was worth $1,500, that the mortgagor gave his assent to the mortgagee's making

the sale, as if the date of default had been specified as of January 1st, 1861, and that there has been no abandonment of the right to redeem by the plaintiffs.

Thereupon the court adjudged that the defendants held the lot, notwithstanding the transmission of the legal title through the impeached deeds upon the trusts of the original mortgage; and, to ascertain the relations of the parties to each other, ordered a reference to the clerk to take and state an account of,

1. The amount due on the secured debts;

2. The rents and profits that were or ought to have been received by the mortgagee in his life-time, and by the defendants who have continued the occupancy of the lot since, as well as the deductions to be made for taxes and other expenditures paid in the protection of the property, and

3. The value of permanent improvements made during their possession, and to make report thereof at the next term.

From this judgment the defendants appealed.

Messrs. J. A. Lockhart, J. D. Shaw and *Hinsdale & Devereux*, for plaintiffs.

Messrs. Burwell & Walker, for defendants.

SMITH, C. J., after stating the facts. With this summary recapitulation of facts, we proceed to consider the successive rulings to which are taken the exceptions presented in the record.

1. The subscribing witness to the instrument, executed to supply the omission in the mortgage introduced to prove the execution, was permitted after objection to testify to the mental and physical condition of the mortgagor at the time. The objection is not pointed nor specific, but we understand it to be upon the ground of the tendency of the evidence to impeach the validity of the instrument or impair its force, as an assent to the sale by the mortgagee.

We do not see any sufficient reason for opposing the admission of the testimony, as directly bearing upon the inquiry whether

the mortgagor in his life-time gave consent to the sale; but if there were, it has been rendered harmless and the objection to its introduction removed by the affirmative finding of the jury on that issue.

2. There were different estimates of the value of the lot, at the time of the mortgage sale, given by witnesses; and a witness examined by defendant was asked to state how a lot on the opposite side of the street, specified, compared in value with this in dispute, and at what price it was sold in October, 1868. This question, on plaintiffs' objection, was disallowed.

The estimate of persons called on to testify as to the value of land is derived from actual sales of similar property at the place or in the vicinity; from the opinions of competent persons acquainted with such property, and from the personal knowledge and opportunities of observation possessed by the witnesses. Upon these an opinion as to the value of any particular lot rests, and is entitled to greater or less confidence, as the means of information and the individual capacity of the witness to form a correct judgment from experience or otherwise, are greater or less.

The credit due to the opinion may be arrived at by interrogating the witness as to his means of information and opportunities for forming an estimate, but it is not admissible so far to extend the examination as to introduce a new issue as to the value of another lot, open to corroborating and disproving evidence like that before a jury. The exclusion of the question is clearly warranted by the decision in *Warren* v. *Makely*, 85 N. C., 12, and for the reasons there given. The proposal here is in substance to ascertain what another lot actually sold for nearly two years afterwards, and how it compares in value with that in the mortgage, with no suggestion as to a similarity in condition or improvement, or any association except in proximity of locality. The testimony was properly rejected.

3. The instructions asked for defendants and refused are embodied in these propositions:

(*a*) Ten years having passed since the mortgagee entered into possession, and a longer time since default in the mortgagor, the law presumes an abandonment of the equity of redemption, and there being no rebutting evidence, that presumption must prevail.

(*b*) The statute of limitations and that raising the presumption of abandonment began to run in the bargainor's life-time, and continued to run against those who succeeded to his equitable rights.

Accepting either date, that fixed upon for the default or that when the trustee entered into possession, and excluding the interval during which the operation of the statute was suspended, ten years, the period prescribed to raising the presumption, had not expired. That this interval should not be counted in computing the time in cases like the present, is expressly held in *Edwards* v. *Jarvis*, 74 N. C., 315, where the defendant claimed by possession under a deed made in September, 1865, and again in *Hawkins* v. *Savage*, 75 N. C., 133, where the action was for a tort committed in March, 1867, SETTLE, J., who delivered the opinion, saying: "The time elapsed from the 20th day of May, 1865, to the 1st day of January, 1870, shall not be counted so as to bar actions on suits, *or to presume satisfaction or abandonment of rights*, save only that actions of debt, covenant, assumpsit or account upon any contract, demand or penalty incurred since the 1st (20th) day of May, 1865, and the remedies thereon, shall be the same as they were in the year 1860."

4. The possession of the mortgagee under the reconveying deed to himself as color of title, it is insisted, perfects the title and protects the estate from the plaintiffs' claims.

The proposition is not tenable so far as it relates to the legal title, for the mortgagee upon default was entitled to the possession, and no action for its recovery could have been successfully sustained by the plaintiffs, and it is only when those who could, and do not enter and sue, that the right of entry and action is

barred as to them. *Reynolds* v. *Cathens*, 5 Jones, 437; *Wittkowski* v. *Watkins*, 84 N. C., 456.

5. That the mortgagee or trustee cannot purchase the trust property at his own sale, either directly or through the intervening agency of a third person, is too well settled by authority to admit of argument, unless his *cestui que trust* elect to confirm the sale and hold him to it; and this, not because fraud has been practiced, but for the reason that it may be; and the law will not sanction a proceeding that puts his personal and private interests in antagonism to his fiduciary obligations. The subject is carefully examined and the previous cases so fully reviewed in *Froneberger* v. *Lewis*, 79 N. C., 426, that we deem it needless to make further references. The right of election, however, resides in the *cestuis que trust*, who may affirm or disaffirm the sale. *Patton* v. *Thompson*, 2 Jones' Eq., 285; *Brothers* v. *Brothers*, 7 Ired. Eq., 150. Even unsecured creditors have been, after many years, allowed to set aside a sale made by the trustee to an agent and a reconveyance to himself; and, even after, under proceedings in the court of equity by the trustee against the personal representative and infant heirs of the deceased bargainor, to compel them to elect, and their election to abide by the sale. *Elliott* v. *Pool*, 3 Jones' Eq., 17.

The only serious difficulty we have felt in granting relief grows out of the time allowed to pass before the suit was begun, and a suggestion of RODMAN, J., that "perhaps it may be that the statute of limitations of three years on a parol promise may furnish the proper rule," made in the opinion in *Joyner* v. *Farmer*, 78 N. C., 196.

But our conclusion is, that no such restriction can be put upon the exercise of the right of the mortgagor and his representatives to call the mortgagee to an account of the trust estate, before the inaction and acquiescence give effect to the statutory inference of a surrender. This would be clearly so, we think, under the limitations of the Code of Civil Procedure (not, however, applicable to the present case), since a time is prescribed for

bringing any action in the enumerated list, and a general limitation upon all others not mentioned, § 37.

There is certainly no limitation of time in which a secured party or the mortgagor must call on the mortgagee or trustee for an account, because there are no adversary relations between them, until the presumption of the statute is raised; and we do not think these relations were changed by the action of the mortgagee in this effort to transmit the estate from, and, through the continuance of an agency, back to himself. These deeds as against the plaintiffs were, as if they had never been made, they electing so to treat the transaction.

In *Joyner* v. *Farmer*, *supra*, the plaintiff mortgagor was present at the sale and did not object, retained possession as tenant for a year, and received from the mortgagee the residue of the money for which the land sold after deducting the rent. There are no such recognitions on the part of these plaintiffs, and one only of them was at the sale, and all but one or two of them under age on January 1st, 1870, when the suspending act expired by limitation.

We are of opinion that they have not lost their right to bring this action from laches and delay. The recent case of *Dawkins* v. *Patterson*, 87 N. C., 384, is not repugnant to the views expressed, and it is there held that the mortgagee may sell and become himself the purchaser under an express contract of the mortgagor that he may do so, and when he gives an additional year for the redemption, as the consideration for the privilege. There is no error, and this will be certified.

No error. Affirmed.

*W. F. RUFFIN and others v. JAMES OVERBY.

Ejectment—Adverse possession—Colorable title, continuous possession necessary to perfect.

1. Every possession of land by one other than the claimant is deemed to be adverse until proof to the contrary is made.
2. Where acts of ownership consisted in the payment of taxes on the land, and the employment of agents in respect to it, in the absence of *actual* possession on the part of the alleged owner; *Held*, error to permit the jury to consider such acts in passing upon the question of continuous possession required to perfect a colorable title under a deed. Here, the jury should have been instructed that no such continuous possession was shown by the plaintiff.

(*Jackson* v. *Com'rs*, 1 Dev. & Bat., 177; *Scott* v. *Elkins*, and case cited, 83 N. C., 424; *Logan* v. *Fitzgerald*, 87 N. C., 308; *Pope* v. *Matthis*, 83 N. C., 169; *State* v. *Jones*, 87 N. C., 547, cited and approved).

EJECTMENT tried at Spring Term, 1882, of STOKES Superior Court, before *Eure, J.*

Defendant appealed.

Messrs. Boyd & Reid, R. B. Glenn and *J. T. Morehead*, for plaintiffs.

Messrs. Watson & Glenn and *Gray & Stamps*, for defendant.

SMITH, C. J. The plaintiffs, asserting their ownership of the large territory described and defined in their complaint, seek in this suit to recover possession of the portion alleged to be wrongfully withheld by the defendant. In his answer, the defendant, not controverting the claim of the plaintiffs to other parts, about which he professes not to know, sets up title in himself to three several tracts which may be within the plaintiffs' boundaries, and the lines of which are specified with precision.

*Mr. Justice RUFFIN did not sit on the hearing of this case.

Three separate issues as to the plaintiffs' ownership of the separate tracts were submitted to the jury, and they respond in the affirmative to each.

Upon the trial and in support of their title to the entire area claimed, the plaintiffs produced and read in evidence a deed from Charles Banner, sheriff of stokes county, to Archibald D. Murphy, dated on December 13th, 1815, conveying the land to him in pursuance of a sale for taxes, and wherein it is recited as belonging to Timothy Pickering, of Massachusetts, and also a deed for the same from the said A. D. Murphy to Thomas Ruffin, executed on June 8th, 1822. The plaintiffs exhibited no other deeds.

The proofs offered of possession were as follows: Joel Hill, who, for the ten years preceding 1850, was a deputy of the sheriff, testified to the fact that the Ruffin land was entered on the tax-lists, but of its situation he was ignorant.

William King proved that his brother, Alex. King, now deceased, was the agent of Thomas Ruffin for many years, and resided on his own adjoining farm, but never occupied any part of the Ruffin land; that some twenty-five years before, Thomas Ruffin, Jr., came to the house of the brother of witness and furnished one hundred dollars, which was expended in prospecting for minerals on the land; that on one occasion witness applied to one Banner, another agent, for the purchase of a site for a school-house upon it; that Banner made sale of some of the land, acting for his principal and not as disposing of his own property, and that neither King nor Banner occupied any part of the land.

The tax-lists of Stokes county were produced, and showed that in 1824 the Murphy tract of 2,488 acres was given in, and in 1827 the same number of acres were given in under the name of "Ruffin land."

William J. Moore testified to his becoming an agent for Thomas Ruffin in 1872, and as such, taking possession of the tract described in the plot, except the parts now in controversy;

that he sold some and leased and rented other portions and paid the taxes on 2,400 acres; that Thomas Ruffin, Jr. let King have a portion of the land after his father's death and during his mother's life-time, and that King had, as agent, made sale of a part as before stated; that one Isham Banner claimed some of land under a contract with Banner, the agent, but never entered upon it; that part of the disputed land was in possession of one John Sisemore when witness first knew it, more than twenty years since; that the place occupied by him, known as the "Green Place," and now claimed by the defendant, was apparently an old settlement, and that he (witness), when assuming his agency, took possession of all the territory included in the surveyor's plats, except that then in defendant's possession and claimed as his own property.

The surveyor, George, testified to his running the red lines on the north of the plat, including in his survey the tract of fifty acres designated as the "Green Place" by a deed to John Sisemore, and to his running the boundaries of the other disputed land by a grant from the state to the defendant, issued in 1869, and stated that no other deeds were produced before him.

It was shown that the surface of the territory described in the deeds, from which the plaintiffs claim and in their complaint, is broken wild mountain land on the north, extending up on the Saura Town mountain.

There was no evidence that the plaintiffs, their ancestors, or the agents of either, ever built on, cultivated, or fenced in any portion of it, or exercised acts of ownership other than those already detailed.

The inquires put to the jury, in the form of three separate issues as to the plaintiffs' ownership of each of the tracts claimed by the defendant, received an affirmative answer in their verdict.

Of the series of instructions given to the jury at the instance of the plaintiffs, and to which the defendant excepts, it becomes necessary to notice only those numbered 4, 6 and 8 in disposing of the appeal.

The court charged that:

4. There is no evidence of any possession adverse to the plaintiffs;

6. The jury may consider such acts of ownership, as are in evidence, exercised by the plaintiffs (including, as we understand, those under whom they claim) in making up their verdict upon the question of actual possession;

8. If the plaintiffs (embracing preceding claimants with whom they are in privity of estate) have had actual possession of a part of the land included in the boundary of their deed, such possession would in law extend to the whole, unless some other part was held adversely by another person.

There is error, we think, in the first two of these directions, and while there is none in the other as an abstract legal proposition, in its relations to the two others and the proofs before the jury, it was calculated to mislead them, and may have misled them, in applying it to the evidence, to an erroneous conclusion.

IV. There was evidence of an adversary possession, since every possession is deemed to be such, until its qualified or subservient character is shown and the presumption disproved.

"Every possession is taken to be on the possessor's own title," remarks RUFFIN, C. J., "until the contrary appears, as the possession is in itself the strongest evidence of the claim of title, and, when long continued, of the title also." *Jackson* v. *Com'rs of Hillsboro*, 1 Dev. & Bat., 177. It was shown in the testimony of the agent, Moore, that when he first became acquainted with the land, more than twenty years back, the said John Sisemore was in possession of that in dispute and occupied the "Green Place," which then bore the marks of being "*an old settled place*"; and when the witness took possession in 1872, three years before the bringing the suit, he found the defendant in possession of the part which is now in contest and was then claimed by him, and did not interfere with it.

Again it was proved by one of the surveyors that he ran the lines of red color on the map, including the "Green Place,"

under a deed to Sisemore, and the other disputed land by the boundaries given in a grant from the state to the defendant, issued in 1869. This brief recapitulation is sufficient to show the error in the charge upon this point.

VI. The instruction numbered 6 is, in our opinion, not warranted by the evidence, and the jury ought not to have been left at liberty to infer, from the facts proved, such continuous possession as is required to perfect a colorable title under a deed. The listing of property for taxation and the payment of taxes therefor—contracts for sale or lease merely, without entry—the employment of agencies in the absence of actual possession—these collectively are not acts of possession, for none of them expose the party to the action of the true owner, so as to bar or displace his rights, and confer rights upon others. The *prospecting*, by which we suppose is meant searching for minerals upon the land, is an entry and an act of taking possession with an assertion of title, but how long it was continued is nowhere shown, and it was an arbitrary inference that this act, or any other, showed such a protracted possession as was necessary to divest title out of the state, or, assuming it to be divested, put the title in the plaintiffs or their ancestors.

Of course we have no reference to the possession taken in 1872, the character of which is not questionable; but this possession left, as it found, the defendant in the undisturbed occupation and enjoyment of that which he still holds.

We have recently had occasion to comment on the possession necessary, when accompanied with a color of title, to vest an estate in the person so holding, and to distinguish it from repeated acts of trespass, merely, which have no such effect, in *Gudger* v. *Hensley*, 82 N. C., 481, recognized in *Scott* v. *Elkin*, 83 N. C., 424, and *Logan* v. *Fitzgerald*, 87 N. C., 308, and a further discussion would be needless. See also, *Pope* v. *Mathis*, 83 N. C., 169.

VIII. The eighth instruction, in connection with the fourth, is subject to objection for its direct tendency to mislead. The

court had already ruled that there was no possession hostile to the plaintiff, and the further direction that unless there was, the constructive possession from an entry on part was extended over the bounded area, would be in effect to oust the defendant and preceding tenants from the portion actually occupied by him or them, and cover it with the plaintiffs' constructive possession. The language of the court admits in this respect of an interpretation unauthorized by law, which, if in fact it did not, may have, conducted the jury to their verdict. It is, moreover, the duty of the judge not to indulge in the utterance of mere general principles, though they may be correctly stated, but as is said in the recent case of *State* v. *Jones*, 87 N. C., 547, to apply the law to the facts as the jury may find them, in order to their making an intelligent use of the advice of the court in arriving at a just verdict. In the case before us the jury should have been told that all the facts shown by the plaintiffs do not constitute the continuous possession required by law to perfect their title, and in the absence of evidence their finding should be for the defendant.

To recover, the plaintiffs must show title; and it is as full a defence to the defendant if they fail to prove it in themselves, as it would be, if affirmatively shown to be in the defendant.

For these errors the verdict must be set aside and a *venire de novo* awarded, and it is so adjudged. This will be certified.

Error. *Venire de novo.*

MARY M. CONDRY v. THOMAS CHESHIRE.

Ejectment—Betterments—Substitution—Judgment.

1. That the plaintiff in ejectment may recover upon an equitable title is a settled rule of law in this state.
2. Where the defendant in such case claims the value of permanent improvements as against the rents, he may, after judgment and before execution, proceed by petition to have the same assessed. Bat. Rev., ch. 17, § 262 *a*. The defendant, here, is not entitled to the right of substitution.
3. A judgment against a party upon whom no service of process has been made nor appearance entered, is absolutely void, and may be so treated without any direct proceeding to vacate it.

(*Murray* v. *Blackledge*, 71 N. C., 492; *Farmer* v. *Daniel*, 82 N. C., 152; *Stallings* v. *Gully*, 3 Jones 344; *Doyle* v. *Brown*, 72 N. C., 393; *Albea* v. *Griffin*, 2 Dev. & Bat. Eq., 9; *Merritt* v. *Scott*, 81 N. C., 385; *Hill* v. *Brown*, 76 N. C., 124, cited and approved).

EJECTMENT tried at Spring Term, 1881, of IREDELL Superior Court, before *McKoy, J.*

The plaintiff claimed under the following clause of John McLelland's will, which was put in evidence:

ITEM 5. "I give and bequeath to my neighbor and friend, R. H. Parks, two hundred and twenty-five acres of land, lying on the waters of Dutchman creek, being part of the plantation on which I formerly lived, including the dwelling and outhouses, in trust and confidence nevertheless for the sole use and benefit of Mary Condry, wife of Thomas Condry, and the heirs of her body, during her natural life, and at her death to the said heirs of her body to their own use, them and their heirs in fee simple forever."

It was proved that her husband died in 1858, and the plaintiff also offered evidence of the value of the yearly rents, claimed in the action, and rested her case. The children and heirs of the plaintiff were made parties during the pendency of the action.

The defendants, Cheshire and R. Holmes, put in evidence the

records of the court of equity for Iredell county, in which is set out in full an *ex-parte* petition of said Parks, trustee, filed at fall term, 1858, in which neither the said Mary nor her children were made parties, asking for a sale of the lands upon the ground that they were not yielding any rents beyond an amount sufficient to keep up repairs, and that the necessities of the said Mary and her children were great, and the interest of the purchase money would be more beneficial to them than the land. There was a decree of sale, and the land was bought by one Nathaniel Holmes at $775; report confirmed, purchase money paid, and a decree for title to be made to the purchaser.

It was also in evidence that Parks received the purchase money on the 8th and 9th of October, 1860, and loaned it out in good hands, but afterwards received the same from the borrowers in Confederate money, which he put into a safe, where it still remains. Parks is dead, and his heirs and executors were made parties defendant.

The deed from the clerk and master to the purchaser was put in evidence; also two deeds from him to the defendants, Cheshire (his son-in-law) and R. Holmes (his son), dated in 1872, for about one-half of the land to each, and reciting in each of the deeds the consideration of fifty dollars, the same being gifts or advancements of so much of his estate to them as his children.

The defendants offered to show the value of the annual rents, and permanent improvements put on the land by Cheshire, and that the same exceeded the rents in value, but on objection, the court refused to admit the evidence, on the ground that the improvements were not set up in the answer specifically as a counterclaim, and that in this action the remedy was by petition after judgment. Defendants excepted.

They then insisted that as the action is to recover the possession of land, and as the legal title was in the heirs of Parks, the trustee, who are parties defendant, and no judgment is demanded against them, the plaintiff should be nonsuited. But the judge held that under the will the plaintiffs had such title as enabled

them to maintain the action, unless the same had been divested by the sale under the petition in equity, and not being parties to the petition, nor assenting to or opposing the sale in any way, they were not bound by the decree, and were therefore entitled to recover. Defendants excepted. The statute of limitations was not relied on.

The court having held that the plaintiffs were entitled to recover, the defendants, Cheshire and Holmes, asked for a decree substituting them to the rights of the plaintiffs, that they might follow the proceeds of the sale in the hands of their co-defendants, the executors of Parks. But the judge was of opinion, and so ruled, that the administrator of the purchaser, Nathaniel Holmes, deceased, and not Cheshire and Holmes who paid nothing for the land, was entitled to be substituted. Defendants excepted.

Verdict and judgment for plaintiffs, appeal by defendants. The grounds of appeal set out in the case are:

1. For that the court held that plaintiffs, upon the title under the said will, were entitled to recover in the present form and scope of the pleadings in this action, and refused to nonsuit the plaintiffs.

2. For refusing to admit evidence of the value of said permanent improvements and that they exceed the value of the rents.

3. After deciding that in law the plaintiffs were entitled to recover the land, the court erred in holding that Cheshire and Holmes were not entitled by way of substitution to recover of their co-defendants, executors of Parks, the proceeds of sale paid to him.

No counsel for plaintiffs.

Messrs. Scott & Caldwell, A. S. Merrimon and *Robbins & Long*, for defendants.

ASHE, J. The first ground of appeal taken by the defendants is without foundation. It has been decided by this court and is

now to be considered a settled law of the state, that a plaintiff in an action to recover real property may recover upon an equitable title, even as in this case where the legal estate is in his trustee. *Murray* v. *Blackledge*, 71 N. C., 492; *Farmer* v. *Daniel*, 82 N. C., 152. And if the ground of appeal was intended to embrace the ruling of His Honor upon the legal effect of the decree in equity on the right of the plaintiffs to recover in this action, that question has been settled with no less certainty, in *Doyle* v. *Brown*, 72 N. C., 393, where it is held that "when a defendant has never been served with process, nor appeared in person or by attorney, a judgment against him is not simply voidable, but void, and may be so treated whenever and wherever offered, without any direct proceeding to vacate it." To the same effect is *Stallings* v. *Gully*, 3 Jones, 344.

Here, there was no service or pretence of service upon the plaintiffs, either by personal service or by publication; nor any appearance by them in person or by attorney; nor any knowledge of the proceeding in equity until long after the decree of sale, and no ratification of the same.

As to the second ground: There was no error in the refusal of the judge to admit the evidence offered by the defendants with regard to permanent improvements.

The doctrine of betterments prior to the act of 1871–'72 (Bat. Rev., ch. 17, § 262 *a*), was recognized and admitted in this state only in cases of a purely equitable character: as where a contract for the sale of land had been rescinded, or the title had failed by reason of the contract not being in writing, &c. *Albea* v. *Griffin*, 2 Dev. & Bat. Eq., 9; *Hill* v. *Brower*, 76 N. C., 124. The doctrine has never been applied to actions of ejectment. To make it applicable to that action or to actions under the Code in the nature of ejectment, legislation was necessary. Hence the act of 1871–'72, which extended the doctrine to actions to recover land in nature of ejectment, prescribing the mode of proceeding, by petition, after judgment and before execution. And in *Merritt* v. *Scott*, 81 N. C., 385, it was held that to enjoy

the benefit of the act, the defendant after judgment must file his petition and ask to be allowed for his permanent improvements over and above the value of the use and occupation of the land. This remedy is still open to the defendants.

The remaining ground of appeal is not less untenable than those we have considered. We concur in the opinion expressed by His Honor that Cheshire and Holmes had no right to be substituted to the rights of the plaintiffs against their co-defendant executors, and for the reason assigned by him that they were mere volunteers and had paid nothing for the land, and that if any one had the right to such substitution, it was the representative of Nathaniel Holmes, but he was not a party to the action.

There is no error. The case is remanded that the defendants may have an opportunity to file a petition under the act of 1871–'72, if they shall be advised to do so.

No error. Affirmed.

F. M. KEATHLEY v. A. B. BRANCH and others.

Ejectment—Pleading and proof—Variance.

1. In ejectment, the plaintiff claimed as purchaser under a mortgage executed in 1869; the defendant, as purchaser under a mortgage executed in 1876, and failing to make good his title thereunder, he offered to show a sale of the land for taxes and a deed to himself from the sheriff, but this evidence was ruled out upon the ground that the defendant is precluded, by the terms of his answer, from setting up any other title than that asserted therein; *Held*, error.
2. As the plaintiff recovers upon the strength of his own title and the defendant is permitted to show that the title is in a stranger, so also, he may show it to be in himself, though derived from a source differing from the one alleged in the answer.
3. The court intimate that the Code cures the alleged variance between the pleading and the proof.

4. An answer which fails to state separately the distinct grounds of defence will be rejected, if exception is taken at the proper time.

(*Isler* v. *Foy*, 66 N. C., 547, cited and approved).

EJECTMENT tried at August Special Term, 1882, of DUPLIN Superior Court, before *Gilliam, J.*

Judgment for plaintiff; appeal by defendant, Stanford.

Mr. H. R. Kornegay, for plaintiff.
Mr. O. H. Allen, for defendant.

RUFFIN, J. It is evident from the statement of the case, that two exceptions were intended to be taken in the court below for the defendant, Stanford, who alone appeals.

The first one, however, is so obscurely stated and some of the facts in regard to it so evidently misstated, that it is impossible for the court to understand its meaning, or determine its force. It is much the same, indeed, with the other, though enough can be extracted from the case to enable the court to detect, what it conceives to be, an error in the ruling of the judge upon it.

The question is one of pleading and evidence, arising out of the following facts:

The plaintiff claims the land as a purchaser under a mortgage executed on the 9th day of October, 1869, by the defendant, Branch, to one Jones. As originally instituted, the action was against the defendant alone, who answered, denying the plaintiff's title. The complaint was in the usual form, alleging in its first article the title to be in the plaintiff, and in its second, the unlawful withholding of the possession by the defendant. Afterwards, the defendant, Stanford, applied to be made a party, and in support of his motion filed an affidavit, in which he set forth that he was, himself, the owner of the land, having purchased the same under a mortgage executed by Branch to one Moore, on the 5th day of April, 1876; and, upon his being made a party defendant, filed an answer, in which he alleged "that the first article of the complaint is not true, that the title to the land is

in himself, and that he claims title from one Moore, to whom the defendant, Branch, executed a mortgage, by virtue whereof it was sold and purchased by him."

On the trial the defendant, Stanford, having failed to make good his title under the mortgage to Moore, offered in evidence a deed to himself from the sheriff of the county, and to show that the land in question had been sold for taxes and purchased by himself. This evidence was objected to by the plaintiff and excluded by the court, and to this ruling the defendant excepted.

It is not stated when this sale took place, nor for whose taxes the land was sold. But as it is expressly said that the sale was for *taxes due on the land*, we are obliged to conclude that they were rightly owing, either by the defendant, Branch, or some one claiming under him, whose duty it was to list the land and pay the dues thereon; and as all inquiry into the regularity and validity of the sale was cut off, we must make every presumption in its favor.

Neither does it appear in the case, upon what ground the evidence was excluded, though, upon the argument, we were told that it was because the court held that the defendant, Stanford, was precluded by the terms of his answer from setting up any title, other than the one asserted in his affidavit and answer, as derived under the mortgage given to Moore.

But whatever may have been the ground for it, it was an error as it occurs to us. The answer certainly falls short of the requirements of the Code, in that, it fails to state separately the distinct grounds of defence, and, if objected to at the proper time on this account, might well have been rejected by the court. Still it was not so objected to, but received, and upon a fair construction must be admitted to set up two plain defences, consisting in a general denial of the plaintiff's right to recover the land, and a specific avowal of title in the defendant himself.

Conceding, then, that as to the latter the defendant was bound by his answer, and could only rely upon the title therein alleged, though the provisions of the Code curing variances between

pleadings and proofs render even this doubtful, it was yet open to him to establish his other defence in any way that he could.

This, he might have done by showing the right to the land to be in a stranger, since every plaintiff in ejectment must recover upon the strength of his own title; and if so, why not show it to be in himself, though it may have been derived from a source differing from the one alleged in the answer.

It nowhere appears, either in the defendant's affidavit or his answer, that he claimed to be the landlord of his co-defendant, Branch; nor does he seem to have been admitted as a party by the court because of any privity with him, or in order that he might defend his possesion; but simply as an act of discretion on the part of the court, and because he claimed to have an interest in the subject matter of the action.

This being so, every means of defence was open to him as to any other defendant. As said in *Isler* v. *Foy*, 66 N. C., 547, why permit a person claiming title to be made a defendant, unless that he may plead separately, and avail himself of every defect in the plaintiff's title? The effect of His Honor's ruling is to deprive the defendant of one of his main grounds of defence, and it cannot be right, especially since he will be forever estopped, by the record of this case, from ever asserting his other title to the land, however valid the same may be.

Error. *Venire de novo.*

J. H. N. BRENDLE by his guardian v. A. J. HERRON and others.

Ejectment—Infancy—Equity—Consideration—Purchaser, for value and without notice.

A deed to the plaintiff (a minor) was delivered to his father to keep for him, and a few days thereafter, in pursuance of a certain arrangement intended to give ease and favor to the father, the deed was destroyed without having been registered, and the land conveyed by the same grantor to the defendant; *Held*, in an action for the land, &c. (1) The plaintiff, being an infant, was incapable of parting with the estate conveyed, or of assenting to the destruction of the deed. (2) Equity will restore the plaintiff to the position he was in before the destruction of his muniment of title. (3) Payment of the land by relatives of the plaintiff, is a sufficient consideration to support the conveyance. (4) To entitle the defendant to priority over the plaintiff, he must show that he is not only a purchaser for value, but also without notice of the plaintiff's equity.

(*Tolar* v. *Tolar*, 1 Dev. Eq., 456; *Plummer* v. *Baskerville*, 1 Ired. Eq., 252; *Walker* v. *Coltraine*, 6 Ired. Eq., 79; *Crump* v. *Black*, *Ib.*, 321; *May* v. *Hanks*, Phil. Eq., 310, cited and approved).

CIVIL ACTION tried at Spring Term, 1882, of HAYWOOD Superior Court, before *Gilliam, J.*

The plaintiff seeks to have the defendant, Herron, declared a trustee to his use of the legal title of a certain parcel of land, and to set up a lost deed to the same and to recover the possession thereof.

The facts upon which the rights of the parties depend, and which seem not to be controverted, are as follows:

In 1866, the father of the plaintiff was seized of a tract of land, and in December of that year conveyed one-half thereof (it being the parcel now in controversy) to the plaintiff, then an infant of tender years, and the other he conveyed by distinct deeds to his two daughters, then both married women.

At that time he was sued in an action for slander, brought by one Salinda Parris, since intermarried with one T. D. Welsh, and it is conceded that these conveyances to his children were made with the intent to delay the plaintiff in that action, in case it resulted adversely to him.

In 1867, the said Salinda recovered judgment for the sum of two hundred and fifty dollars and the costs, and caused execution to issue, and the whole of the land to be sold on the 2d day of October, 1869, when the said Welsh, with whom she had intermarried, bid off the same at the price of ten dollars, and had his bid credited upon the judgment, and took a deed from the sheriff to himself for all the land conveyed in the three deeds to plaintiff and his sisters.

On the first day of October, 1870, in consequence of an arrangement made with the adult members of the family, the said Welsh, without the joinder of his wife, executed deeds to the plaintiff and his two sisters for the same parcels of land (that had been hitherto conveyed to them respectively by their father), in consideration of the sum of five hundred dollars, secured to him by the bond of the husbands of the plaintiff's two sisters, and the sum of one hundred dollars in cash to cover the costs of the slander suit—the plaintiff then being some thirteen years of age, and his deed being delivered to his father to be kept for him.

Twelve days thereafter, these last recited deeds, without having been registered, were destroyed, in pursuance of another arrangement intended to give ease and favor to the plaintiff's father, and to which his said father, his two sisters and their husbands, the said Welsh and the defendant, Herron, were parties; and thereupon the entire tract of land, embracing the three distinct tracts, was conveyed to the defendant, Herron, by a deed signed by Welsh and his wife, the plaintiff's sisters and their husbands, and his father, the consideration of which was $3,400, of which $600 was to go to Welsh to cover the costs of the slander suit, and the sum secured to him as the consideration of the deeds he had made to the parties; $700 to each of the sisters for

their respective lots of land, and $1,400 to the plaintiff for his lot—this last deed to the defendant being duly proved and registered.

On the trial a single issue was submitted to the jury, who found that the deed from Welsh to the plaintiff, dated October 1st, 1870, conveyed an estate in fee to him, and thereupon the court declared the rights of the parties to be:

1. That the defendant, Herron, has a lien on the land in controversy for the sum of $300—being the one-half of the sum agreed to be paid to Welsh, as the consideration for his deeds of October 1st, 1870, and which, under the subsequent arrangement, the said defendant paid.

2. That upon the payment of such sum, with interest from the 12th day of October, 1870, the said defendant should be deemed to be a trustee of the legal title of said land for the use of the plaintiff, subject however, to the dower right of Mrs. Welsh, in case she should outlive her husband, which right the defendant had acquired under his deed of the 12th of October, 1870, to which she was a party.

The defendant, Herron, appealed from this judgment.

No counsel for plaintiff.

Messrs. J. M. Gudger and *Armistead Jones*, for defendant.

RUFFIN, J. What the exact nature of that estate is, which a bargainee in a deed of bargain and sale acquires upon the execution and before the registration of his deed, and whether he can, by a simple act of surrender or of cancellation of the unregistered instrument, unaccompanied with any written agreement, determine that estate, and revest it in the bargainor, seem to be still vexed questions in this state, and the authorities with reference to them hopelessly irreconcilable. But important as they may be, and desirable as it is that they should be put upon a more certain footing than they now occupy, it is not necessary, and therefore not proper, that we should assume that task in the

present case, since, irrespectively of them, the court thinks the plaintiff clearly entitled to the relief he seeks in the action.

That some estate, of some sort, vested in him upon the execution of the deed by Welsh on the 1st of October, 1870, and its delivery to his father for him; and that, being an infant, he was incapable of parting with that estate, or of assenting to the destruction of the deed under which he took—and that no one could lawfully do so for him—are all propositions that admit of no argument against them.

Whatever, then, the nature of his estate may have been, it still abides, unimpaired, in the plaintiff; and it is in order that he may be in a condition to assert it, that the court of equity will restore him to the position he was in before the unwarranted destruction of his muniment of title.

In *Tolar* v. *Tolar*, 1 Dev. Eq., 456, and in *Plummer* v. *Baskerville*, 1 Ired. Eq., 252, it is said, that whenever a deed which has been once duly delivered is improperly withheld from registration, a court of equity will compel its production for that purpose, or, if destroyed, will have its place supplied by another.

In *Walker* v. *Coltraine*, 6 Ired. Eq., 79, the jurisdiction of the court in such case is said to be founded purely in the fact, that certain rights were acquired by the delivery of the deed, which by its destruction are obstructed.

It is no answer to this right of the plaintiff to be put *in statu quo*, to say, as was said in the argument, that he himself paid nothing as the consideration of the deed made to him by Welsh, and that, having nothing but a bare equity, he should be postponed to the superior title of the defendant, who has paid the full consideration called for in his deed, and withal has acquired the legal estate.

In the first place, the promises of the plaintiff's brothers-in-law to pay the purchase money to Welsh, evidenced by their bonds to him, constituted a consideration amply sufficient under the statute of uses to support the conveyance to the plaintiff. In 2 Saunders on Uses, 58, it is declared that the consideration of a

deed of bargain and sale need not be paid upon the execution of the instrument, nor by the party to whom it is made, but that it will suffice, if secured to be paid at a future day, and by another on his account; and as to the priority asserted for the defendant on account of his having secured the legal estate, it is sufficient to say, that he acquired it, as well as his equitable estate, not only with a knowledge of the plaintiff's claim, but in pursuance of a tortious agreement, made with the party intrusted with the plaintiff's deed, for its destruction, and it would be contrary to every principle which should obtain in a court of equity, to permit him thus to take advantage of his own wrong, and thereby acquire precedence over the older and *bona fide* claim of the plaintiff. To entitle himself to such a priority, as is claimed for him, he must show, not only that he is a purchaser for value, but one without notice. See *Crump* v. *Black*, 6 Ired. Eq., 321, and *May* v. *Hanks*, Phil. Eq., 310.

This court can perceive no error therefore in the judgment of the court below, of which the defendant Herron can complain, and the same must be affirmed.

As to how far the plaintiff, when restored to the legal title in the land, may be affected with a trust in favor of Mrs. Welsh, by reason of the fact that it was originally purchased with her judgment against the plaintiff's father constituting her separate property, is a matter we have not considered upon this appeal. So far as we can discover from the record, it was not made a point upon the trial, by either party, and no issues were submitted, or instructions asked, with reference to it; and if there had been, it could avail nothing, since the defendant sets up no such defence in his answer, but professes to meet the plaintiff squarely upon the single issue as to their respective titles acquired under the deeds from Welsh. It would then be a case of "proof without allegation," which, as said in *May* v. *Hanks*, *supra*, "is no better than allegation without proof."

No error. Affirmed.

S. H. JOHNSON and others v. LAWSON HAUSER.

Ejectment—Actual Possession—Notice to Purchaser.

The rule laid down in *Edwards* v. *Thompson*, 71 N. C., 177, and other cases, to the effect that actual possession of land by a person other than the bargainor, is sufficient notice to a purchaser of such person's equity, approved.

(*Mulholland* v. *York*, 82 N. C., 510; *Edwards* v. *Thompson*, 71 N. C., 177; *Bost* v. *Setzer*, 87 N. C., 187; *Tankard* v. *Tankard*, 84 N. C., 286, cited and approved).

EJECTMENT tried at Spring Term, 1882, of YADKIN Superior Court, before *Avery, J.*

The land mentioned in the complaint and demanded in the action belonged to one R. C. Poindexter, who in the year 1876 executed a deed therefor to J. H. Jenkins and Abram Hauser, and they in the month of August, 1878, conveyed the same to the *feme* plaintiff.

In answer to the complaint and as a counterclaim, the defendant alleges that in 1872, Poindexter entered into an agreement to sell the land to him for the sum of three hundred dollars, and to make title when the purchase money was paid; that under this contract he entered into possession and held and used the land until he was ejected therefrom in 1879 by the plaintiff; that in 1876, when most if not all of the purchase money had been paid (and all was paid before and during the year 1878), he applied to the vendor for a deed, which the latter refused to make until another debt of seventy-five dollars, contracted by the defendant in buying a mule, was also discharged; that the defendant thereupon applied to the said Jenkins and Hauser to advance the money for him and pay what he owed the vendor, which they promised to do and did do, taking from the vendor a deed for the premises, absolute in form, upon an express trust and agreement that they would hold the same as a security only for the money advanced, and on being re-imbursed would

reconvey to the defendant; and that the *feme* plaintiff bought the land and took title from them with full notice of the defendant's equity.

The defendant now offers to pay the money advanced, and demands a conveyance of the title.

The replication put in by the plaintiff denies that any contract in writing, if any contract at all, was entered into by the said Poindexter with the defendant, so as to be of binding force upon him, and denies also the transactions as detailed in the answer.

Several issues were prepared and submitted to the jury, all of which were withdrawn after the testimony had been heard, except the second, which is in these words: 2. Did the plaintiff have notice of the defendant's interest in the land when it was conveyed by Jenkins and Hauser to her? the court being of opinion that a reference for an account would become necessary if there should be an affirmative finding upon this inquiry.

The evidence adduced on the trial was conflicting, upon the point of the plaintiff's having actual notice of the defendant's trust, attaching to the estate of her bargainors at the time of her making the contract of purchase and taking the deed of conveyance from them. Upon her own examination she admitted that the defendant was then in possession, and had been for several years previous, and the fact was known to her; but she was not aware that he had or claimed any interest in the land, and made no inquiries of him on the subject.

The defendant requested an instruction to the jury, that if the defendant was in the actual occupation of the land at the time of the plaintiff's purchase, this was sufficient notice to her of the defendant's equity. The court refused so to charge, and directed the jury that such possession was not constructive notice to the plaintiff, and in order to be charged with it, she must have had actual notice of the asserted equity. The defendant excepted to the refusal to charge as asked and to the charge given in place of it. The verdict on the issue was for the plaintiff, and from the judgment rendered thereon the defendant appealed.

No counsel for plaintiffs.

Messrs. Haywood & Haywood, for defendant.

SMITH, C. J., after stating the case. The validity of the trust under the agreement stated in the answer, and attaching to the estate conveyed to Jenkins and Hauser, independently of the parol contract of purchase from Poindexter, does not appear to have been contested, and if it had been, it finds support in the ruling in *Mulholland* v. *York*, 82 N. C., 510, and the cases therein cited. Assuming the legal sufficiency of the defendant's equity and right to have a conveyance to him, on his re-imbursing the amount advanced by Jenkins and Hauser, as against them, the inquiry is as to the notice necessary to their following the estate transferred to the plaintiff, and this is the only point presented in the appeal.

We think the defendant was entitled to the instruction asked, and that there was error in refusing to give it, as well as in the instruction given in substitution. The decisions of this court are conclusive to this effect.

In *Edwards* v. *Thompson*, 71 N. C., 177, the subject was carefully considered, and it was held that an open, notorious and exclusive possession in a person other than the vendor, is a fact of which a purchaser must inform himself, and *he is conclusively presumed to do so.*" This ruling was made applicable to the plaintiff who resided in South Carolina, and had no knowledge of the agreement of sale out of which the equity arose, or of any incumbrance of the title of his bargainor, except so far as could be inferred from the fact of possession, and this fact was also unknown to the plaintiff. *Bost* v. *Setzer*, 87 N. C., 187; Adams' Eq., 158.

The same deduction of notice from possession, merely, is made in the later case of *Tankard* v. *Tankard*, 84 N. C., 286, and allowed to prevail against an express finding of the jury to the contrary, upon a distinct issue submitted. Delivering the opinion, DILLARD, J., observes: "An actual possession is a fact that

the purchaser ought to know, and the right by which the possessor holds is also a fact he might know by inquiry, and therefore *the law presumes that he does know it.*"

Here, not only is the actual possession conceded, but the plaintiff had personal knowledge of the fact before and at the time when the deed to her was executed; and the case is more strongly against her in the effort to escape responsibility and discharge the estate of the adhering trust, than against those in the cases referred to.

There is error, and the verdict must be set aside and a *venire de novo* awarded. Let this be certified.

Error. *Venire de novo.*

N. McARTAN, Adm'r, v. R. A. McLAUGHLIN and others.

Executors and Administrators—Sale of Decedent's Land—Powers—Deed.

1. Where the land of the ancestor is sold by a commissioner for partition among the heirs, within two years after letters of administration on the estate, and a deed executed after the two years; *Held*, that the land is still subject to the payment of the ancestor's debts. The deed in such case relates to the date of the sale, and not to the time of its execution. Bat. Rev., ch. 45, § 156.

2. The power of a sheriff to sell land under execution, of a clerk under order of court, or of a special commissioner, is a bare power disconnected with any estate in the land; the deed of such officer, whenever made, refers to the power itself, and the purchaser takes from the time of the execution of the power and not from the date of the deed. (Distinction drawn between common law powers and such as operate under the statute of uses).

(*Davidson* v. *Frew*, 3 Dev., 3; *Pickett* v. *Pickett*, *Ib.*, 6; *Rodgers* v. *Wallace*, 5 Jones, 181; *Dobson* v. *Murphy*, 1 Dev. & Bat., 586; *Woodley* v. *Gilliam*, 67 N. C., 237, cited and approved).

McARTAN *v.* McLAUCHLIN.

SPECIAL PROCEEDING commenced before the clerk and heard at Fall Term, 1882, of CUMBERLAND Superior Court, before *Gilmer, J.*

The defendants appealed from the judgment of the court below.

Mr. N. W. Ray, for the plaintiff.
Messrs. Hinsdale & Devereux, for defendants.

RUFFIN, J. The appeal in this case brings up a single question, for the understanding of which a brief summary of the facts is needed.

The plaintiff, as a creditor of Daniel McLeod, deceased, sued his administrator, the defendant, McLauchlin, and at spring term, 1876, recovered judgment for $2,000, and he seeks in this action to have the lands of his deceased debtor sold to satisfy his demand.

The said McLeod died in May, 1870, and the defendant, McLauchlin, qualified as his administrator on the 11th of August, 1870, and has fully administered the personalty, except a very small sum of money in hand.

The heirs of McLeod filed a petition before the probate court asking for a sale of the lands of their ancestor for partition. An order was granted and the defendant, McLauchlin, was appointed commissioner to make the sale. He sold on the 3d of November, 1871, made a report thereof, which was confirmed on the 1st of February, 1872. He afterwards reported that all the purchase money had been paid, and on the 16th of July, 1872, an order was made directing its distribution amongst the parties entitled. The commissioner prepared and signed the deeds for the several purchasers on the 9th of July, 1872, and delivered them as follows: To R. A. McLauchlin in August, 1872; to Duncan Smith on the 8th of November, 1872, and to Sarah Smith on the same day.

The defendants are the said administrator and the heirs-at-law, and the said purchasers of the land; and the latter contend, that, as they took their deeds more than two years after the grant of letters of administration on the estate, their lands are protected from sale under the statute—Bat. Rev., ch. 45, § 156.

While there may not be—and so far as the court is aware, there is not—any direct adjudication upon the point, there are still several authorities which, by analogy, seem to control it. Indeed, a consideration of the very nature of judicial sales, and the powers under which they are made, would seem to do so.

In *Davidson* v. *Frew*, 3 Dev., 3, the facts were that the plaintiff purchased the land in dispute at execution sale in the lifetime of the execution debtor, but neglected to take the sheriff's deed until after his death; the defendant was his widow and claimed dower; it was held that the officer's deed took effect from the time of the sale and defeated the widow's claim, favored though it was in law. Not, as it was said, that the title passed by the bare act of sale, but that the deed, when afterwards made, had the effect to take the estate out of the defendant in the execution and vest it in the purchaser from that time.

The authority of this decision has been repeatedly recognized, and in *Pickett* v. *Pickett*, reported at page 6 of the same volume, the reason for it is given. It is said to proceed from the very nature of the officer's power—it being but a bare power, disconnected with any estate in the land, the rule in such case being that the deed relates to the power itself and takes effect as if made at the moment the power was executed.

In *Rogers* v. *Wallace*, 5 Jones, 181, the matter was again explained, and at greater length, by PEARSON, J., and the distinction clearly drawn between common law powers, where there is no seizin to serve the estate, and such as operate under the statute of uses. In the case of the former, he says the doctrine is well established that the deed, whenever made, refers to the power itself, so that the party is deemed to take, not from the date of the instrument, but from the time of the execution of

the power: and he emphatically declares that the power to sheriffs to sell land under execution, and to clerks to sell land under the orders of the court (and by parity of reasoning, we add commissioners) are all instances of common law powers, which fall under the rule.

Accordingly, it was held in *Dobson* v. *Murphy*, 1 Dev. & Bat., 586, that a sheriff's deed, made seventeen years after the sale, had relation to it, so as to put the title in the purchaser from that day, GASTON, J., remarking, that the deed was but the consummating ceremony of the transaction begun so long before.

Again, upon the same principle it was said by RODMAN, J., in *Woodley* v. *Gilliam*, 67 N. C., 237, that the title of a defendant in an execution passes to the purchaser *by the sale and from the date of the sale*, and that it matters not when the deed is made, as it is merely evidence of the sale and relates to it.

In conformity with these decisions, and with what, in itself, seems to be a just principle, the court thinks and so declares, that the defendants took the lands from the commissioner, in the same plight and condition they were in at the moment of the sale, and subject, as they were, to the payment of the decedent's debts.

The judgment of the court below is therefore affirmed, and this will be certified to the end that that court may proceed according to law in the premises.

No error. Affirmed.

JAMES C. McLEAN, Administrator, v. A. A. McLEAN and others.

Executors and Administrators.

1. A bond given by one as "administrator or executor" is binding upon him individually, and the sureties on his official bond are not liable for its payment.

2. The distinction between a promissory note and a bond given by one as personal representative, in reference to his liability, pointed out by Ashe, J.

(*Sleighter* v. *Harrington*, 2 Mur., 332; *Hall* v. *Craige*, 65 N. C., 51; *Kerchner* v. *McRae*, 80 N. C., 219, cited and approved).

Civil Action upon an administration bond, tried at Fall Term, 1882, of Robeson Superior Court, before *Shipp, J.*

The action was brought by the plaintiff as administrator *de bonis non* of D. H. McLean, against the defendant, as administrator of G. W. McLean, and the sureties upon his bond. The breach of the bond, assigned as the cause of action, is the non-payment of a judgment obtained in the superior court at fall term, 1875, against the defendant, which is as follows:

"It appearing by the complaint of the plaintiff that the defendant is justly due and indebted to the plaintiff in the sum of $455.61, and the defendant having failed to answer, it is considered and adjudged by the court that the plaintiff do recover of the defendant, administrator of G. W. McLean, the sum of $455.61," with interest and costs.

It was admitted by the plaintiff that this judgment was founded upon a note under seal, given by the defendant, A. A. McLean, to the plaintiff, in consideration of an open account due by the defendant's intestate to the plaintiff's intestate.

The court gave judgment in favor of the plaintiff and the defendants appealed.

Messrs. McNeill & McNeill, for plaintiff.
Messrs. French & Norment, for defendants.

Ashe, J. The plaintiff insisted the judgment was *de bonis testatoris*, and the defendants contend it was *de bonis propriis*, and this is the only question presented for determination.

We are not furnished with a copy of the note sued on, but we infer from the pleadings and admissions that it was a bond signed by the defendant, A. A. McLean, *as administrator*.

As a general proposition of law, an administrator cannot make any contract to bind the estate of his intestate. If he gives his promissory note to pay a debt due by his intestate, it will be binding on him individually or not at all. If the note is founded upon a sufficient consideration, as of assets applicable to the debt, or forbearance, he will be individually liable; but if there is no consideration, it will be *nudum pactum*. At the common law he was liable individually upon his *verbal* promise to pay, if there was a sufficient consideration for the promise; and although the promise be in writing, it will be of no more effect since the statute of 29 CHARLES II. than before, unless it be by *deed*, or there be a good consideration for it. Williamson on Executors, 1610.

It is well settled by the almost unvarying current of authorities, that the promissory note of an administrator or executor, founded upon the consideration of forbearance or the possession of assets, will be binding upon him in his individual capacity, although he should sign the note "as administrator or executor." Williams, *supra;* Parsons on Contracts, 128; *Woods* v. *Ridley*, 27 Miss.; *Sims* v. *Stilwell*, 3 How. (Miss.), 176; *McGrath* v. *Bevers*, 19 S. C., 328; *Sleighter* v. *Harrington*, 2 Mur., 332; *Hall* v. *Craige*, 65 N. C., 51; *Kerchner* v. *McRae*, 80 N. C., 219.

If the promissory note of an administrator, with a sufficient consideration to support it, will be binding upon him individually, *a fortiori* will his bond have that effect.

There is a marked distinction between a bond and a promissory note in reference to the liability of an administrator or executor. In the case of a promissory note, given for value received, it bears only *prima facie* evidence of consideration, and it is open to the defendant to go into the question of consideration and show, for instance, that he had no assets, at the time of making the note, applicable to the debt of the estate for which the note was given, or that there was in fact no consideration for the promise expressed therein. But a bond is a deed, signed, sealed and delivered. It is the act and deed of the party signing it,

and it imports a valid consideration. It is against all principle to suppose that an administrator or executor could give such an instrument as would be binding upon the estate of his intestate or testator. Of course, then, where the engagement of the representative to pay a debt of the decedent is by a bond, it is a compliance with the statute, but concludes the defendant from showing that there was no consideration.

Mr. Williams, in the passage above cited, recognizes the distinction. He says, though the promise be in writing, it is of no more effect since the statute than before, unless it be by *deed*, or there be a good consideration. Again, on page 1018, note 1, of his work, we find it laid down, that "a note given by an executor by way of submission to arbitration is not binding, unless there were assets in his hands. When the submission is made by bond, the executor is liable, not only because a seal imports a consideration (for a promissory note imports a consideration), but also because, when a person has executed an instrument under seal, he shall not be permitted to disprove the consideration. Both the bond and the note import assets, and of course a sufficient consideration: the consideration of the bond cannot be explained; that of the note may, as between the original parties and all parties having notice of the consideration." See the numerous cases there cited in support of these propositions.

In *Davis* v. *Mead*, 2 Ky., which was an action upon a bond given by the defendants as executors, the court say: "The plea of *plene administravit* cannot avail them: the naming them executors was but descriptive of the persons, and the judgment was *de bonis propriis*." It is true in that case some stress is laid upon the fact that the declaration was in the "*debet* and *detinet*," but it could not have been otherwise in an action upon such an instrument.

In *Hall* v. *Craige*, *supra*, which was an action upon a judgment confessed by the defendant and others, the court held that the judgment bound them in their individual capacity, though they styled themselves executors in making the confession.

In *Kerchner* v. *McRae*, *supra*, where the action was brought upon a note under seal, executed by the defendants, as executors, to secure the amount of an account due and owing by their testator at the time of his death, it was held that the defendant was liable individually upon the bond, and the judgment was rendered against him in that capacity.

From these authorities our conclusion is, that the judgment in question was a judgment against A. A. McLean in his individual capacity, and the naming him "administrator" therein was mere surplusage; and consequently the defendants, W. A. Sellers and McKoy Sellers, are not liable as sureties on the administration bond of A. A. McLean, for the breach alleged in the complaint.

There is error. The judgment of the superior court is reversed, and the judgment of this court is that the said defendants go without day, and recover their costs.

Error. Reversed.

JOHN ALEXANDER and wife and others v. JOHN WOLFE'S Executors.

Executors and Administrators—Parties—Suit to recover proceeds of land sale.

1. An administrator having in his hands a fund derived from the sale of real estate, holds it for the heirs of the intestate, and, upon the death of such administrator, suit to recover the same may be brought by the heirs alone against his personal representative.

2. But where, in addition to the proceeds of sale of real estate, there is also in his hands a fund derived from other sources, the administrator *de bonis non* of the original intestate should become a co-plaintiff with the heirs (unless as in this case they release their claim to the personal estate) in order to a recovery, in one action, of the full amount due both.

(*Allison* v. *Robinson*, 78 N. C., 222, cited and approved).

ALEXANDER *v.* WOLFE.

CIVIL ACTION tried on exceptions to a referee's report, at Fall Term, 1882, of MECKLENBURG Superior Court, before *Graves, J.*

In the year 1858, John Wolfe, the defendant's testator, was appointed guardian of Dorcas W. Lee, an infant, and as such received, besides a considerable personal property from other sources, from the clerk and master in equity her share of the proceeds of sale of certain real estate, made under a decree of court for partition between herself and other tenants-in-common. The sums so received were $620 on January 10, 1861; and $325 in confederate currency of the scaled value of $108.33 on January 15, 1863.

On April 30, 1867, Dorcas, the ward, died unmarried and intestate, and letters of administration on her estate issued to her guardian. Without having administered the same, John Wolfe himself died, in the spring of the year 1880, leaving a will (since admitted to probate), in which he appointed the defendants, C. H. and W. L. Wolfe, his executors.

This action, instituted August 15, 1869, by the plaintiffs, who are the heirs-at-law of the intestate, Dorcas, is prosecuted for an account of the testator's administration of so much of the trust-fund as was derived from the sale of the intestate's land, and to recover what is due from Wolfe's estate.

The defendants demurred to the complaint for an assigned misjoinder of two incompatible causes of action, which demurrer was overruled on the former appeal to this court (83 N. C., 272) and the cause directed to proceed.

Thereupon an order of reference to the clerk was entered in the superior court, directing him to state the guardian account and ascertain what was due from the testator in that capacity.

At fall term, 1882, the referee returned his report, charging the guardian only with the money paid him by the clerk and master, derived from the real estate of the intestate, and reducing the last sum to its equivalent in gold, according to the legislative scale; and allowing various expenditures, set out in detail in the

account, and among them, payments of $86, to three of the plaintiffs, each, in part of their several shares of the fund.

The defendants filed several exceptions to the report, the first being to any further proceeding in the cause until the administrator *de bonis non* of the intestate, Dorcas, is made a party, his presence being necessary to a full adjustment of the administration account, and to avoid the accountability to him of the personal estate. To meet this objection, the plaintiffs' counsel entered a formal *retraxit* of any claim for the personal estate on the part of the plaintiffs.

This exception was sustained and the others overruled, and thereupon the plaintiffs demanded judgment for the sum ascertained to be due by the referee, which was refused, and they appeal. The defendants also appeal from the refusal to allow their other exceptions.

Messrs. Jones & Johnston, for plaintiffs.
Messrs. Wilson & Son, for defendants.

SMITH, C. J., after stating the case. The inquiry is suggested *in limine*, and before entering upon an examination of the sufficiency of the objection, why this defect of parties was not assigned with the other causes of demurrer, instead of being reserved until after the account has been taken and reported. Nor do we see its pertinency in the form of an exception to the report. But waiving its manifest irregularity in the method adopted for presenting the objection, we are of opinion that it has no force, and ought not to have been entertained.

It is settled by the decision in *Allison* v. *Robinson*, 78 N. C., 222, that whoever holds the fund derived from real estate of the deceased infant, holds it for the heirs, and is directly amenable to their action to recover it. "Suppose there had been no administration," remarks BYNUM, J., speaking for the court, "or he (the administrator) had refused or delayed to bring an action for the

recovery of this fund, are the heirs to be thereby hindered or delayed in coming to their inheritance?"

In like manner, upon the former appeal it is said, that while the proceeds of sale of the real estate "*may be recovered by the heirs-at-law without the presence of an administrator de bonis non*," as declared in the opinion in *Allison* v. *Robinson*, such administrator ought to become a co-plaintiff "in order to the recovery of the full amount due to both in one action, and the defendant not be harassed with two suits and the taking the same account a second time."

The *retraxit* in releasing all claim to the personal estate on the part of the plaintiffs, and confining the action to the pursuit of the money into which the real estate has been converted, dispenses with the necessity of making the administrator a party whose only recourse is upon the personal estate. It matters not that the defendants are not relieved, but remain liable to account for this estate to such administrator, when appointed: this will be the only responsibility resting upon them. The severance of the fund enables the parties entitled to the several parts to pursue and recover what is due them, and there will not be successive harassing suits for the same fund. There is no rule of pleading or practice that forbids this to be done.

If, then, the other exceptions are rightfully overruled, as the sum reported has been derived exclusively from real estate, and the personal estate has been administered according to the allegations in the complaint, and the debts and expenses incidental thereto discharged, so that the personal representative, should there be one, has no claim upon the fund, the plaintiffs should have had judgment according to their demand. We proceed, therefore, to consider the disallowed exceptions of the defendants brought up by their appeal.

The exceptions expanded into many forms, and, presented in different aspects, may be condensed into a smaller number:

1. The defendants except to the exclusion of a claimed credit of $700, which they allege, as trust-money, was part of a loan of

two thousand dollars to one S. A. Davis, for securing which his note with one William T. Still as surety, was taken on August 26, 1863. The note produced bears a credit endorsed of $1,000, bearing date on the 29th of October following. The residue of the debt was lost by the insolvency of the debtors and the delay in collecting; and much of the testimony taken relates to the alleged delinquency of the testator in making efforts to enforce it during his guardianship and subsequent administration of the intestate's estate. The note is drawn payable to him as guardian, and it is contended that $700 of the trust-fund of the ward's money was thus invested and lost, for which there ought to be a credit in the testator's account.

Without adverting to the legal consequences of this commingling of trust-money with that of the guardian in a single loan, and the effort to throw the loss upon the infant by treating her share as remaining in the note, while in two months after the loan was made one-half of the amount was repaid by the debtor and appropriated exclusively to the guardian's own use, which present the transaction, to say the least, in no favorable aspect for him, it is a sufficient answer to the exception that it is not shown that the money was any *part of the real estate fund.* The only testimony on the point is that of the mother of Dorcas Lee, who states that the guardian consulted her about making the loan, and she approved of it; that he subsequently showed her the note and told her "that seven hundred dollars of the money was the money of Dorcas, and the balance his own." This does not prove that the proceeds of the land constituted any part of the ward's money thus used; and the long interval since its reception is evidence tending in a contrary direction. The claim of the credit was properly denied.

2. The defendants, insisting that the loan consisted, so far as the ward is affected, of her money paid over by the clerk and master, except, that in charging the testator the scale was not applied as of the date of the loan, as to the entire $700; and if

not, as to the sum of $325, last received from that source. This exception, depending on the preceding, must fall with it.

3. The defendants except that the referee fails to find the fact that Emma Lee, when she consented to the appropriation of the $86 paid her by the testator, was the guardian of the plaintiff, Lula. The transaction would not be relieved of a concurring misapplication of the money, in applying it to her individual debt, which cannot prejudice the right of the infant. The fact is wholly immaterial to this defence.

4. The defendants further except that certain numbered vouchers offered were rejected without an assignment of the grounds of this action on the part of the referee. But errors must by assigned by the complaining party in order to their being understood and rectified. This the defendants do not do. We cannot see, from this vague and indefinite complaint of their rejection, that any wrong was done by the referee; and unless error is shown to have been committed, we must assume there is none.

There is no error in the rulings upon these exceptions, and they are sustained. The plaintiffs are entitled to judgment.

PER CURIAM. Judgment accordingly.

E. D. HAWKINS, Adm'r, v. J. H. CARPENTER and others.

Executors and Administrators—Assets—Reference—Parties.

1. Where a *devastavit* is charged, the primary liability for the waste rests upon the administration bond, and a reference to ascertain the fact was properly ordered.
2. A failure to apply for license to sell land for assets is not of itself a breach of such bond.
3. Lands descended are not assets until a sale thereof and the receipt of the money by the administrator.

4. The administrator *de bonis non* is a necessary party to a suit against the former representative to recover unadministered assets.

(*Rag* v. *Patton*, 86 N. C., 386; *Fike* v. *Green*, 64 N. C., 665; *Vaughan* v. *Deloach*, 65 N. C., 378; *Badger* v. *Jones*, 66 N. C., 305; *Latham* v. *Bell*, 69 N. C., 135; *Pelletier* v. *Saunders*, 67 N. C., 261, cited and approved).

CIVIL ACTION tried at Spring Term, 1882, of RUTHERFORD Superior Court, before *Gudger, J.*

Robert Scruggs died intestate in November, 1858, and letters of administration on his estate were granted to Micajah Durham. Without having fully administered the trust, the latter also died intestate in December, 1864, and his wife, Esther Durham, became his administratrix, and gave bond as such with the defendants' sureties thereon.

In 1865, administration *de bonis non* on the estate of Robert Scruggs was committed to the plaintiff, who, on March 9th, 1878, instituted the present action against the sureties to the bond of Esther Durham, who died several years before, without having settled the estate in her hands.

The complaint alleges that Micajah Durham rendered, at December term, 1863, of the county court, his final account, which was audited and approved by a committee appointed by the court for that purpose, from which it appears there remained in his hands, unadministered, the sum of $112.27, to recover which is the object of the suit.

The complaint further states that a large personal estate belonging to him passed into the possession of his administratrix, sufficient to pay his debts, and that no settlement of his estate has been made by her.

The defendants, in answer, say that their principal has fully administered the assets which came to her hands of the estate of her husband, and that if any remained undisposed of they were lost and rendered worthless by the results of the war, without negligence on her part, and the defendants are not responsible therefor; that they are not informed whether the debt claimed

has been paid, but "plead payment," and insist, if not paid, its recovery is barred by the statute of limitations; and that there is "considerable real estate held by the heirs-at-law of said Micajah, which descended to them from Esther Durham," being part of her estate, and she being the wife of said Micajah.

The record states that the jury found "the issue submitted to them in favor of the plaintiff," without setting out the issue, and we can only infer from the subsequent action of the court that it related to the indebtedness only, and did not involve an inquiry into the assets of the intestate, Micajah, for which his administrator might be held liable.

The plaintiff thereupon demanded final judgment against the defendants upon their bond, which the defendants resisted on the ground that it should be first ascertained whether the administratrix had properly administered the funds with which she is chargeable. The court refused to render judgment, and ordered a reference to inquire as to the assets, and the plaintiff appealed.

Messrs. Hoke & Hoke, for plaintiff.
No counsel for defendants.

SMITH, C. J., after stating the case. It is contended by appellant's counsel that inasmuch as the answer admits that lands, of sufficient value to pay the debt, descended from the intestate, Micajah, to his heirs-at-law, which could by proper proceedings issued against them by the said Esther have been subjected to the payment of the debt, her failure to convert such real estate into assets for the purpose is itself a breach of the official bond, rendering her and her sureties alike liable, as if by this means the conversion into assets had been effected.

We do not concur in this view. The defence set up of a full administration has not been, and ought to be disposed of, and the course pursued by the court, no jury trial being asked, is warranted by the ruling in *Ray* v. *Patton*, 86 N. C., 386.

Nor was the plaintiff entitled to a judgment, fixing assets in the hands of the administratrix, by reason of the failure of the administratrix to pursue the descended real estate for the purpose of converting it into assets. Lands, which may be sold for this purpose under proper proceedings prosecuted by the personal representative, are not, until such sale and the reception of the moneys arising therefrom, assets for which the sureties to the bond can be held responsible.

"The real estate," says DICK, J., delivering the opinion in *Fike* v. *Green*, 64 N. C., 665, "was not assets in the hands of the executors."

The point is made and expressly decided in the subsequent case of *Vaughan* v. *Deloatch*, 65 N. C., 378, in which evidence was offered, and on objection admitted, in the superior court to show that the intestate debtor, whose administrator was a defendant in the action, owned lands at his death which descended to his heirs-at-law, and from which the administrator by proper proceedings for a sale could have derived the means of paying the debt.

READE, J., reviewing the case on appeal, says: "The only question is, whether real estate is assets to pay debts before the same has been sold and the proceeds received by the administrator? Recent decisions settle the question," referring to the case recited. "It may be," he concludes, "that in a case of negligence, the administrator would be liable on his bond for not obtaining license and selling, but that is not before us."

The present contention is the same as in that case, that the defendants should be charged with assets because these were lands which their principal, the personal representative, took no steps to sell.

But the complaint shows that the assets received by the administratrix from the husband's estate, and adequate to meet the debt, were wasted by her; and if so, she could not maintain a

proceeding to sell the land. For this *devastavit* the remedy is upon the bond. *Badger* v. *Jones*, 66 N. C., 305; *Latham* v. *Bell*, 69 N. C., 135.

Again, the descended lands, according to the statement in the answer accepted as the basis of the plaintiff's motion, remain unalienated in the hands of the heirs-at-law of the intestate, Micajah, and are accessible to his creditors by proceedings conducted for the purpose of converting them into assets by his proper representative, and this recourse is still open to the plaintiff. *Pelletier* v. *Saunders*, 67 N. C., 261.

As a *devastavit* is charged, the primary liability for the waste or misapplication rests upon the administration bond, and an inquiry into the fact becomes necessary to ascertain which, in the event of no demand for a jury trial being made, a reference is the appropriate step to be taken in order that the necessary information may be obtained, and this course was pursued.

We advert to the omission to make a party to the cause, the administrator *de bonis non* of the intestate, Micajah, who, under repeated decisions of this court can alone maintain an action, for the recovery of the unadministered assets, against the former representative, to avoid an inference from our silence that the suit can be supported in his absence from the record. But the point is not presented and we only decide there is no error in the ruling. This will be certified.

No error. Affirmed.

T. P. COVINGTON and others v. J. C. LATTIMORE, Executor.

Executors and Administrators—Confederate Money.

1. The rule laid down in *Patton* v. *Farmer*, 87 N. C., 337, and other cases, in reference to the management of trust-funds during the war, approved.

2. Where an executor, having confederate money of his own, pays his co-executor a debt due the testator's estate, there being no exigency requiring its collection and no collusion between them, and the amount is on the same day handed back to him to be held as a part of the assets; *Held*, that he cannot thereby shift a loss upon the estate, but is responsible for the debt.

3. While executors cannot sue each other at law, they may proceed in equity whenever necessary to protect the estate.

(*Cumming* v. *Mebane*, 63 N. C., 315; *Shipp* v. *Hettrick*, *Ib.*, 329; *Drake* v. *Drake*, 82 N. C., 443; *Robertson* v. *Wall*, 85 N. C., 283; *Patton* v. *Farmer*, 87 N. C., 337, cited and approved).

CIVIL ACTION tried on exceptions to a referee's report, at Fall Term, 1882, of CLEVELAND Superior Court, before *Graves*, *J.*

The plaintiffs appealed from the judgment overruling their exceptions.

Messrs. Hoke & Hoke, for plaintiffs.
Messrs. R. McBrayer and *W. J. Montgomery*, for defendant.

SMITH, C. J. William Covington died early in the year 1861, leaving a will in which the defendant and one D. P. Gold are nominated executors, both of whom accepted the trust and proceeded to administer the testator's personal estate. Gold has since died, and the present suit, at the instance of the legatees other than the widow who has assigned her interest to them, is against the defendant, surviving executor, for an account and settlement of his administration.

The referee, who, under an interlocutory order, has been directed to take and state an account, made his report at spring term, 1882, accompanied with the evidence taken, in which he finds the defendant indebted upon his administration in the sum of $635.32, with interest on $516.61, thence until paid.

The plaintiffs filed four, and the defendants seven exceptions to the report, all of which were overruled by the court, except

that of the defendant numbered two, which was sustained, and from the judgment pursuant to which the plaintiffs appeal. Our revision is then confined to the adverse rulings upon the plaintiffs' exceptions, and allowance of the one exception of the defendant.

The plaintiffs except:

1. For that the referee does not charge the defendant with the amount of his own indebtedness contracted during the testator's life, and evidenced by his single bond.

2. For that the defendant is not held responsible for all the debts due to the testator before the civil war.

3. For that the referee finds as a fact that the defendant kept his collections in confederate currency for the estate, distinct and separate from his own funds, and for which he ought to be held liable.

4. For that he finds that the identical currency thus received and invested in certificates authorized and provided for its retirement in an enactment of the confederate government.

The second exception of the defendant allowed is:

For that he is wrongfully charged with interest on his bond to the testator.

This exception and the first of the plaintiffs' relate to the same subject matter, and are close connected. These will be noticed after disposing of the others.

Second Exception: The testimony shows that the funds were divided between the executors, each taking such as were due from persons residing in his own vicinity and most convenient of access; that the defendant proceeded to collect such claims as he held soon after the administration sale on April 2, 1861, and most of his receipts were during the next year; that the payments were made in confederate money, current and accepted by prudent men in discharge of ante-war and other obligations and in business transactions; that the money, collected and kept apart from that of the executor, could not be loaned or used in the interest of the estate, and was kept and subsequently invested in

confederate certificates, which were produced before the referee from the clerk's office, where they had been left as vouchers upon a rendered account, one in the sum of $900, deposited by the deceased executor on March 15th, 1864, the other of $1,500, deposited by the defendant on the 3d day of the same month.

These facts relieve the executors from personal responsibility in the collection and retention of the funds and for the consequent loss, in accordance with repeated adjudications heretofore made in reference to fiduciaries charged with the management of trust-funds. We refer to some of them: *Cumming* v. *Mebane*, 63 N. C., 315; *Shipp* v. *Hettrick*, *Ib.*, 329; *Drake* v. *Drake*, 82 N. C., 443; *Robertson* v. *Wall*, 85 N. C., 283; *Patton* v. *Farmer*, 87 N. C., 337.

Third Exception: The referee and judge concur in the sufficiency of the proofs that the trust funds were not mixed with those of the executor and were kept separate, and we think their conclusion warranted by them. It will not, therefore, be disturbed

Fourth Exception: The same disposition must be made of this exception, for the testimony is positive and direct that the identical money was put in the certificates, and we cannot disregard it upon inferences of the improbability of the proved fact.

The plaintiffs' first and the defendant's second exception will be considered together.

The plaintiffs' complaint, that the defendant is not, and ought to be, charged with the amount of his own debt, so far as it refers to the principal money, is founded upon a misconception of the facts. The referee reports two accounts, one of the joint administration conducted by both executors, the other of his personal relations to the contested charge. In the former is a single charge of $3,455.91, the value of the personal estate that went into the hands of the executors, as shown by Exhibit "B" (excluding, we suppose, the testator's slaves), embracing in this aggregate the debt due by the defendant to his testator. The vouchers allowed for disbursements and charges admitted by the referee, absorb this value with an addition of two years interest on $3,015.26,

actually collected, and show an excess of $185, overpaid by the executors. Among the executors' credits is not found the debt due from the defendant, and he is consequently charged therewith. The referee, however, does charge the defendant with the interest since accrued, which was not and could not be in the general account, without any diminution on account of the excess found due to the executors. The defendant's exception raises the question whether he is responsible for the interest, which has not been discharged, as for the principal which has been so discharged by the expenditures, arising since to May 8, 1882, to which time the computations of the referee are made, and after that date.

The referee has allowed interest in favor of the testator's estate on the amount of actual collections in money by the executors for two years, though not on the full value of the personal estate, while no interest is computed and admitted upon the series of disbursements that extinguish the entire charge.

We do not concur in the ruling of the court, but sustain the conclusion of the referee that the defendant is accountable for the interest on his debt, and that the method pursued for his exoneration cannot have that effect. The defendant, having confederate money of his own, paid to his co-executor the amount of his debt, and it was accepted by the latter as a discharge, the fund being on the same day handed to the defendant to be held as part of the trust estate. The referee finds that, in this transaction, there was no collusion between the executors, and that the money was paid by one and received by the other in entire good faith, as if the payment had been made by any other debtor. But at the same time, it appears that the debt, if suffered to remain, was solvent and secure; that no exigencies in the administration required the collection; that such funds could not then be loaned or profitably invested, and this was well known to the defendant; and that the testator's directions were to keep his money at interest, and these the executors, in becoming such, undertook to carry out.

The result of this concurrent action is to shift a loss which would have fallen upon the defendant to the estate entrusted to his management: in other words, he escapes, but the estate suffers. Such a transaction cannot be sustained in a court of equity, for while a trustee is not required to take better care of the trust fund than of his own, he must take the same care of it, and at least cannot seek his own personal advantage at its expense and detriment. Such would be the result if the transaction were to be sustained, and we must hold the debt unpaid and the loss, in the money returned to the defendant, his own.

If the defendant had been in failing circumstances or the money paid of intrinsic and permanent value, instead of a fluctuating and declining currency, the reception of payment would have been upheld. Indeed, if the debt was endangered, the deceased executor would not only have been justified in making the best collection and settlement in his power, but he might have been held individually liable for not making the effort to collect or to secure; for in such case, the adversary relations of the indebted executor towards the estate would impose upon the other the obligation of trying to save this, as any other debt due from a stranger.

This was so ruled by Lord Chancellor COTTENHAM in a case where property belonging to the testator in the hands of one of the executors had been lost by his bankruptcy, and the bill was filed to charge the other executor with its value because of his negligence in not taking steps to secure it. After referring to the general duty of executors "to call in and collect such parts of the estate as are not in a proper state of investment," and in answer to his own inquiry, "is it not a part of his duty, because the property is in the hands of a co-executor, and not of any stranger?" he says, "it is impossible to find any principle for any such distinction." Reciting certain cases, he proceeds to say: "These cases establish that it is the duty of all executors to watch over, and if necessary, to correct the conduct of each

other; and the moment that principle is established, all ground of distinction between the two classes of cases ceases."

While executors may not sue each other at law, they may in equity, when necessary for the protection of the trust estate, as in case the mortgagor becomes one of the executors of the mortgagee, the co-executor may file a bill for a sale of the mortgaged property. 2 Williams on Executors, 1178; *Lucas* v. *Scate*, 2 Atk., 56.

But we think the excess of $185, due the defendant surviving executor, should be discharged out of the accruing interest, and the residue only recovered against him. This will reduce the interest to which the plaintiffs are entitled to $451.62, which, with interest on $576.61, principal money, from May 8, 1882, the plaintiffs may have judgment for according to their respective shares therein under the will. The plaintiffs will also have judgment for the costs of their appeal.

Error. Reversed.

T. REDFEARN and wife v. M. AUSTIN, Adm'r.

Distributive Shares, suits for—Executors and Administrators.

Where the same person is administrator and guardian, and an action is brought in behalf of the infant heirs against him and the sureties on his guardian bond, to recover their distributive shares, and no exception is taken by the defendant on account of the non-joinder of the widow of the intestate as a plaintiff; *Held*, (1) That an action subsequently brought by the widow against him, as administrator, for her distributive share, is not demurrable for non-joinder of the heirs as plaintiffs. The defendant in such case acquiesced in a severance of the action. (2) Nor is the pendency of the suit on the guardian bond an obstacle in the way of the plaintiff, such bond not being a security for what is due her, and there being no identity between the parties or the cause of action.

(*Harris* v. *Johnson*, 65 N. C., 478; *Woody* v. *Jordan*, 69 N. C., 189; *Sloan* v. *McDowell*, 75 N. C., 29, cited and approved).

REDFEARN *v.* AUSTIN.

CIVIL ACTION tried at Spring Term, 1882, of UNION Superior Court, before *Gudger, J.*

The *feme* plaintiff is the widow of the defendant's intestate, since intermarried with the other plaintiff, and they bring this action to recover her distributive share in the intestate's estate.

The complaint, among other allegations charges, that the defendant became also guardian to two infant children of the intestate, also entitled to distributive shares in his estate, which passed from the defendant's hands as administrator into his hands as guardian, and being held by him in the latter capacity, they have brought an action on the guardian bond to recover what is due them, and the same is pending in the superior court.

The present suit is to recover the balance due the *feme* plaintiff, a portion of her distributive share having been paid.

The defendant demurs to the complaint, and assigns as grounds thereof:

1. A defect in the parties plaintiff, in that the other infant distributees should be associated with them.

2. The pendency of the other action on the guardian bond.

The demurrer being overruled and the cause remanded to the probate court for further proceedings therein, the defendant appeals from the ruling to this court.

Messrs. Payne & Vann, Covington & Adams and *Haywood & Haywood*, for plaintiffs.

Messrs. Wilson & Son, for defendant.

SMITH, C. J. The demurrer can be sustained on neither ground, and was properly overruled.

1. The complaint avers the transfer of the shares of the infant distributees (that is, of the fund to which they are entitled) from the administration to the guardian account, and its being held by the defendant in the latter capacity. Though this transfer does not conclude an inquiry as to the amount due them and the

defendant's liability upon either bond, the complaint treats the trust fund as constituting an ascertained and fixed sum, the payment of which is enforced against the guardian bond.

But if it were otherwise, the objection would lie against the first action by the infant distributees, for that, the plaintiffs in this action ought to be parties to that. If the defence is pretermitted and not set up in that, it is not available in this suit. If the defendant is content to have a separate controversy about the assets with those who first sue, he cannot obstruct a second and necessary action brought by the other distributee to recover what is due her, by alleging the non-joinder of the others. A severance in the action is the legal consequence of acquiescence in the bringing of the suit by a part, when all should have been united in it.

But the present plaintiffs cannot be associated with the other distributees in prosecuting a suit on the guardian bond, as it is not a security for what is due the *feme* plaintiff, and she has no interest in common with them in enforcing the obligation of the guardian bond. They, and they alone, can sue on it and recover.

2. The other assigned cause of demurrer is equally untenable. The pendency of a former to abate a later suit, must be between the same parties and for the same cause of action, and such concurrence is necessary upon a demurrer under the Code, § 95, par. 3. *Harris* v. *Johnson*, 65 N. C., 478; *Woody* v. *Jordan*, 69 N. C., 189; *Sloan* v. *McDowell*, 75 N. C., 29.

This identity between parties and in the cause of action is not found in these two actions. The plaintiffs are different, and necessarily different persons; for while the two infant distributees could sue the defendant as administrator and the sureties on his administration bond for a default, as well as could the *feme* plaintiff, she could not sue upon the guardian bond, or for a liability incurred as guardian, for the reason that the defendant does not sustain this fiduciary relation to her. The causes of action are also essentially unlike. The breach of obligation

assumed in each capacity may furnish a cause of action, but it is not the same cause of action.

We therefore approve the ruling of the court and affirm the judgment, and this will be certified to the superior court for further proceedings therein according to law.

No error. Affirmed.

J. H. WILSON and wife v. C. J. LINEBERGER.

Executors and Administrators—Guardians—Interest—Commissions.

1. An administrator is responsible for a debt due the intestate's estate, where it appears that the debtor occupied intimate family relations with him, and was engaged in business for some time, during which no steps were taken to collect the same and no excuse given for the neglect.
2. An administrator is not chargeable with interest, where the proof is that he has not used the assets for his personal benefit, nor unnecessarily detained the same in his hands, and has kept an account of his receipts and disbursements.
3. A guardian's primary duty is to invest the trust fund, and he will be chargeable with interest in the absence of proof that it remained in his hand unemployed without his fault.
4. Commissions allowed by a referee will not be reduced unless they are manifestly excessive. No extra charge for *personal* services of the trustee, over the *actual* expenses incurred in the proper management of the fund, will be allowed.

(*Knight* v. *Killebrew*, 86 N. C., 400; *Green* v. *Barbee*, 84 N. C., 69; *McNeill* v. *Hodges*, 83 N. C., 504; *Perkins* v. *Miller*, *Ib.*, 543; *Finch* v. *Ragland*, 2 Dev. Eq., 137; *Morris* v. *Morris*, 1 Jones Eq., 326; *Grant* v. *Pride*, 1 Dev. Eq., 269, cited, distinguished and approved).

CIVIL ACTION tried upon exceptions to a referee's report, at Spring Term, 1881, of GASTON Superior Court, before *Eure, J.*

Both parties appealed from the ruling of the judge.

Messrs. Wilson & Son, for plaintiffs.
Messrs. Jones & Johnston and *N. Dumont*, for defendant.

PLAINTIFFS' APPEAL:

SMITH, C. J. The partnership firm of L. Lineberger & Co., constituted of Lewis Lineberger, J. Laban Lineberger, C. J. Lineberger and Moses H. Rhine, owned and conducted a mill for the manufacture of cotton goods, and in connection with the business, a grist and saw-mill, a blacksmith's shop, and a store for the sale of goods, situated in the county of Gaston. The intestate, Laban, was the general business agent in the purchase of supplies, the sale of goods, and the collection and disbursement of moneys received until June, 1869, when he became incompetent by reason of mental impairment, and this general oversight and management devolved upon the defendant, in addition to his previous duty of keeping the books and making entries of the transactions of the concern.

In November following, on an inquisition finding the lunacy, the defendant was appointed guardian to the estate of the said Laban, his brother; and upon the death of the latter on January, 14th, 1871, himself and the plaintiff, his surviving widow, since intermarried with the plaintiff, J. H. Wilson, were appointed associate administrator and administratrix of his estate. The administration was, however, conducted and concluded by the defendant, and as necessary thereto, the partnership accounts and business were also left in his hands for adjustment and settlement among the members thereof.

On August 24th, 1874, an arrangement was entered into, the particulars whereof are set out in the contract copied and annexed as an exhibit to the complaint, and the enforcement of the terms of which is the object of the present action, for the rendering the administration account by the defendant before the probate judge, and the payment and delivery over to the administratrix

on conditions therein stated, the resultant proceeds of the trust estate in his hands.

The defendant had already, on April 5th, 1871, rendered and filed his account as guardian; and, five days after the making the said agreement, exhibited and filed his account, as administrator, as he did also, on October 23d thereafter, that of his management and settlement of the business of the copartnership—these accounts being verified and with proper vouchers passed on by the probate judge. These, the defendant relies on as furnishing *prima facie* evidence of a correct and legal adjustment of the several trusts, and the resulting balance due on the administration of each.

The jury having found for the plaintiffs upon the single issue of fact submitted, as shown in the record, at spring term, 1877, on their motion, a reference was directed to George F. Bason for a re-statement of the several accounts upon the examination of the defendant, and such other testimony as either party might adduce pertinent to the inquiries ordered, and for a report to the ensuing term.

In pursuance of the order and after continuances, rendered necessary by the comprehensive scope of the duty to be performed, the referee made his report at fall term, 1878, and numerous exceptions were put in by both parties, from the adverse rulings on which by the court, each appeals, devolving upon this court the necessity of passing upon and determining their sufficiency.

The voluminous testimony and numerous exhibits contained in manuscript referred to, but not pointed out in the defendant's many exceptions, though it was otherwise with those of the plaintiffs, imposed on the court such increased and needless labor in searching for the evidence bearing upon them and making the investigation satisfactory, that it was found indispensable to have the record printed, and this was suggested to the respective counsel.

The defendant refusing to assent to a proposition for the printing of the record for the convenience of both in passing upon the separate appeals, the plaintiffs' counsel proposed to print, and did print, for our use, the record in their own appeal, thus enabling us to examine the exceptions *seriatim*, and dispose of the entire cause.

It may become necessary, in consequence of the accumulating business of the court, and the careless practice prevailing in making up transcripts, of sending up matters in no wise bearing upon or elucidating the points presented, to require, as we believe is the general rule in courts of last resort in our sister states, the printing of the record in full, or at least the material facts of them, as indispensable to the proper and efficient discharge of the duties of our appellate and revisory jurisdiction.

We proceed to consider first, exceptions presented in the record of the plaintiffs' appeal in the order of their enumeration:

1. The plaintiffs object to the sufficiency in kind and degree of the proof offered to sustain the credit of $4,700.55, dated March 13th, 1871, allowed by the referee and upheld by the court in the partnership account, denominated and known, in the report of the referee, as the "commissioner's account." The defendant produced the voucher for this credit, to-wit: a note, the body of which is in his own handwriting, bearing the signature of the firm, L. Lineberger & Co., put there by A. P. Rhine and since torn off, and his own name written across its face.

When the note was executed, A. P. Rhine, who shortly thereafter succeeded to the rights and interests of his father, Moses Rhine, by purchasing his share in the firm, was, as agent, attending to the joint business; and the obliteration was made about the time when, as the defendant says, he had a settlement with the firm through the agency of the said A. P. Rhine. The testimony to this effect is furnished by the examination of the defendant, and there being no opposing evidence, the charge was properly allowed.

2 and 3. The next two exceptions to item No. 12, a credit of $1,268.35, and to item No. 13, a credit of $126.83, in the same account, rest substantially upon the same basis, a deficiency in the evidence in their support. These two notes were not produced before the referee, and the testimony in relation to them was in effect as follows: The defendant states that both were signed in the name of the firm by the intestate, Laban, when a member and managing its affairs; that the larger note was money put by defendant in the business, most of it in gold, which his father had given him, and the residue of the consideration of the debt was not now remembered; that both notes were filed with the clerk, as vouchers for the account rendered in his office; that the office had since been burned, and upon his application he could not obtain them.

W. C. Mason states that he applied for the vouchers for defendant at the office, and was given some of them, not including the two specified; that the papers were badly mixed up since the fire, and had not then been sorted and restored to their proper places; and that he was told by the clerk that some of his official papers had been destroyed; and if others than those then delivered should be afterwards found, they would be sent or given to the defendant.

E. H. Withers, the clerk, testified that he examined the guardian account returned to his office and the vouchers, and audited it, and that it corresponded with that produced and shown him upon his examination; that the administration account was in like manner examined and audited, and the charges sustained by proper vouchers; that the office was burned on December 12th, 1874. He further states his recollection to be, that the vouchers in the administration and commission accounts were not left with him, but carried away by the defendant; that those accompanying the guardian account were in his possession for a time; that the defendant's attorney advised him to keep these as well as the others, and defendant said he would remove them at a future time; that he does not remember that the defendant ever did

take away the guardianship vouchers; and that after the fire, witness searched for but could find none of them.

This witness had been previously examined, and his testimony, taken down in writing, had, in some unexplained way, disappeared; and while he denied that he then made any different statement from that of his present testimony, he admitted that he may have delivered to Mason some of the papers connected with the administration and commissioner's accounts, but he did not think he had done so.

He was further asked if he had not before sworn that some of these vouchers had been retained by him, and replied that he did not so testify.

The witness was closely questioned about his absent deposition and whether he had not withdrawn it, to all of which he gave a denial.

Mason swears that the deposition did contain an admission that some of the vouchers were left with the clerk.

This cursory review of the evidence satisfies us, as it did the court below, that the notes were not withheld by the defendant, and their existence being fully established, their absence is accounted for and the finding of the judge warranted.

4. The plaintiffs insist that the evidence fails to sustain item No. 17 in same account, a credit of $375.70.

The defendant says this note was subscribed by E. Pasour—the name torn off; when paid, he did not know; his recollection as to the consideration of the note, which is payable to the senior partner, Lewis, is, that it was for labor performed at the factory in 1870. The evidence supports the charge.

5. The fifth exception is withdrawn.

6. The plaintiffs insist, as erroneous, the omission to charge the defendant with the proceeds of sale of the land made by him as commissioner, and by deed of September, 1874, conveyed to Jenkins, to-wit, $1,200.

The sale was, upon the defendant's testimony, made before the dissolution of the firm, and as he thinks the proceeds passed over

to it. In exhibit "H," balance sheet of Lineberger & Co., the amount of sales of land is entered at $18,447, in which aggregate the objectionable item is supposed to be included, and this conclusion, we think, fairly warranted by the evidence.

7. The plaintiffs complain of the failure to charge the defendant with the note of J. T. Suggs ($220) and negligence in not collecting it. This exception must be sustained. The debtor married the defendant's daughter—was engaged in business for a period of three years and until about four years before the date of the defendant's examination, during which it does not appear that any steps were taken to coerce payment, nor is any reason suggested for the neglect and delay. The debt is enumerated in the class denominated doubtful, and was at the sale bought by A. P. Rhine. The defendant, under the circumstances, must be held responsible for the loss.

We pass to the consideration of the exception to the guardian account.

8. The plaintiffs insist that the credit of $1,035.67, payment alleged to have been made on a note to L. Lineberger & Co., is improper in the absence of the note and without sufficient evidence of the indebtedness represented. The defendant's explanation is that the note embodies the item of $947.68 found in the ledger of the firm in 1869, with interest and some other small unspecified sums. In the referees's report the credit is entered as of January 1st, 1870, and in this discrepancy of date, it is left uncertain whether the payment was made before or after the assumption of the guardianship by the defendant in November preceding. The matter upon the evidence is left in a very unsatisfactory condition. But inasmuch as the credit is found in the account submitted with the vouchers to the probate court and accepted, and has been passed on and allowed by both the referee and reviewing judge, we do not feel disposed to disturb a ruling, based as it would seem to be, upon the supposed recog-

nition of its correctness by the intestate himself, who previous to lunacy had access to the books of his firm and is presumed to have seen the entry.

There is a class of exceptions sustained by the court and to be revised upon the defendant's appeal, not out of place to be considered and decided in this, to which we will now direct attention:

1. The plaintiffs insist that the defendant should be charged in his administration account with the sum of $2,876.75 and interest, due the intestate from the firm and credited to the defendant in the commissioner's account (item 10), as the adjustment must have been effected by entries in the accounts, and the transfer of the amount as a debit in one to a credit in the other.

The attention of the defendant during his examination was called to a credit entered on the partnership books as of December, 1869, to the intestate, of $3,346.68, and he was asked if he had been charged with that sum in either the guardian or administration account? In his answer, he states that it has been brought into the guardian account, intending, as understood, to say that it is included in the larger sum of $3,653.20, with which he is there charged. He states that this last credit was for notes and interest which passed into his hands when he became guardian—for services due the intestate—commissions on sale of land, and personalty, and commissions, $1,000; shown in exhibit "X."

In answer to a further inquiry, if the notes thus received did not enter into the sum mentioned in the exception and allowed as a disbursement in the partnership account, he said he did not think it was, and that according to his recollection, it was money paid him as administrator by the firm.

Upon this testimony, and without exculpatory explanation, the inference seems unavoidable that the referee has omitted to give the intestate's estate the benefit of the indebtedness due from the firm and extinguished in the partnership account, by charging the defendant therewith. But as the defendant is

charged with $259.55 as of the same date in his administration account, deemed to be part of the omitted sum, the latter should be reduced by that amount and the defendant charged with the difference, to-wit, the sum of $2,617.20, and interest from March 31st, 1871. This is the ruling of the court, and it is affirmed.

2. It is claimed that the defendant is chargeable with two notes, each of $1,465, payable in specie and executed in November, 1866.

The decision of this exception requires an examination of the evidence produced before the referee and bearing upon the point.

The *feme* plaintiff, E. C. Wilson, in substance, testifies that she delivered to the defendant, on his appointment as guardian to her husband, two notes, each in that sum, the one payable in gold, the other in specie, dated in November, 1866, with other claims, at the factory; that soon after his marriage to the intestate in December, 1867, he gave her the notes for safe-keeping, and they remained in her possession until she handed them over to the defendant. On being shown the two notes attached to voucher 3 of same principal, and bearing date January 1st, 1860, she states that she never saw any of that date from Lineberger & Co. to her husband; that the notes retained by her were in the handwriting of the deceased, the signature in that of the defendant, and were drawn payable one day after date; that there was also a gold note of $1,000, given in the same manner, among the intestate's effects in her keeping, which was, under defendant's advice, destroyed; that she had applied unsuccessfully to defendant, since, for copies of the notes surrendered to him, but had never demanded the return of the papers or any account of them.

The defendant charges himself with the amount of the two notes exhibited to the preceding witness, the principal of each being $1,465, but which Lewis Lineberger testifies in describing them as being one for that sum, and the other for $1,455, ten dollars less. This witness, if his testimony is to be received over the objection founded on section 343 of the Code, explains that

a dividend of the assets of the firm was agreed upon, paying $1,000 to each member on account of cotton on hand, and this $1,000 note was given to the intestate for his share. But the firm afterwards agreed to annul the distribution and cancel the notes representing the shares of each, and all were surrendered and cancelled, except that retained by the intestate and found among his effects after his lunacy. The intestate was then the managing partner, and most urgently pressed the surrender and cancellation as a disposition of the matter. He reiterates the practice to adjust annually the accounts of the several members with the partnership, and the giving a firm note by one of the others for what was found due each. Each successive settlement included in the ascertained result the precedent indebtedness, represented in the partnership note, which was thus extinguished in the new note. In these settlements, the intestate's services were estimated and included. The witness states that the notes attached to the voucher were executed at the specified date, the one for labor rendered by the intestate during and after the close of the civil war, the other in renewal of an old debt, and that there had been successive annual renewals previous to January, 1869, and the intestate required it to be specie, because it was contracted before the war, and that these were the only debts due to the intestate by the firm.

This testimony disposes of the controversy if it is admissible and accepted as true, and the witness being no party to the suit nor having now or heretofore any interest to be affected by the result of the action, his evidence is not obnoxious to the directions of the provisions of the Code, since, if there were found such notes in existence, the antecedent were merged in the two last, and this is a more reasonable solution of the difficulty. The defendant's statement is in effect the same.

It would not be just to charge the defendant with the notes described by the *feme* plaintiff, and again with similar amounts supported by his testimony alone. If he is to be charged thus, his testimony in exoneration should also be heard, and this rule

is recognized in the Code itself. We had occasion to refer to it in the case of *Knight* v. *Killebrew*, 86 N. C., 400. In either aspect of the case, the defendant should only once be charged with the two notes, and the difference between those he admits and those described by the *feme* plaintiff, consists solely in the larger interest borne by the latter. We, therefore, hold that the defendant is not liable for the double amount.

3. The plaintiffs complain of the commissions as being excessive in amount. We have looked over the account, and think the objection not well founded.

The compensation for adjusting and settling copartnership matters, the receipts and disbursements each being in the aggregate over $100,000, is as follows:

Two per cent. on receipts proper, $109,281.15...	$2,185.62
And on proper disbursements, 31,524.07...	788.10
	$2,973.72

On guardian account:

Receipts, 5 per cent. on $6,131.52.....	$306.56
Disbursements, 2½ per cent. on $2,294.65.....	57.36
	$363.92

On administration account:

Receipts, 5 per cent. on $4,307.94.....	$215.40
Disbursements, 2½ per cent. on $7,382.89.....	184.57
	$399.97
Making a total received for services.....	$3,737.61

We do not consider this sum disproportionate to the labor employed in managing and conducting these trusts to a final adjustment, and unless manifestly excessive, it is unusual to reverse the action of the referee and its confirmation in fixing upon the allowance. *Green* v. *Barbee*, 84 N. C., 69, and cases therein referred to.

4. The objection to the manner of stating the accounts is without force. Those of the partnership and guardianship precede the administration, and ascertain what sums accrue from the two former to the intestate's estate, and they are accordingly entered upon the latter.

5. The rate of interest upon all the items is properly computed at 6 per cent. The higher rate stipulated in the contract is contingent upon the results of a full settlement, which the present action contemplates, and not upon the separate items which enter into it; and it is a sufficient answer to the claim that the law did not authorize, when the contract was made, a conventional higher rate of interest except when founded upon the consideration of a loan of money, and the fact is so stated in the contract itself. Bat. Rev., ch. 114.

The accounts must be reformed in conformity with this opinion, and neither party will recover costs in the appeal.

Error. Modified.

DEFENDANT'S APPEAL:

SMITH, C. J. The exceptions taken by the defendant to the report of the referee and brought up for revision in his appeal, are numerous and complicated in the record. So far as they relate to the series of facts deduced from the evidence, it is needless to consider them in detail, inasmuch as they form the foundation of the referee's conclusions of law, and are to be considered and passed upon in deciding upon their correctness.

The only exception to the findings of fact proper, to be separately noticed, is that relating to the stock which the partnership held in the First National Bank of Charlotte, which on April 2d, 1873, was transferred to H. G. Springs at the price of $105 per share, making the premium paid on the fifty shares $250.

The testimony of the defendant is that the stock was assigned

to him by the firm and taken in part payment of its indebtedness to him, and that he subsequently sold it to his co-partner, Lewis, by whom it was afterwards assigned to Springs. The defendant alone seems to have settled the partnership business after its dissolution, and had this, with the other assets as they were collected, in his hands for this purpose. How and by whom the alleged sale to him was made is not shown, nor the authority from the other members by which it was attempted. If it was merely his own appropriation of the shares at their par value when they were worth much more, and were yielding large semi-annual dividends, as proved by the cashier of the bank, it could have no legal effect in passing the property to the injury of the other equally interested members, and especially of the *feme* plaintiff. The property in the shares did not pass wholly out of the firm until sold and transferred to Springs, and the two dividends paid to the partner, Lewis, properly constitute part of the effects of the firm, for which the defendant, as the sole manager, ought to be and is held responsible in this action, as well as for the full value of the stock itself.

We pass, therefore, to the consideration of those exceptions that involve questions of legal liability, and first those taken to the commissioner's account as reported.

Exc. 9. The defendant objects to being charged with interest on the proceeds of sale of real and personal estate, the cash on hand, and other moneys received from the date of such receiving.

This exception is sustained by the court so far as the interest is computed on both receipts and expenditures in the copartnership account, prior to June 1st, 1873, and directs the interest on all antecedent items to be computed from that day. This ruling is made on the ground that deducting the sales of the land, which were held for and have been distributed among the members of the firm, the difference between the other moneys collected and paid out is inconsiderable, showing no unnecessary detention in the defendant's hands, and negativing the presumption that he has used them for his personal advantage, or made interest or

profit therefrom. Of the sum divided among the partners, the defendant is credited with $4,270.72, the share paid over to the *feme* plaintiff, bearing date 13th day of March, 1872.

Upon this explanatory showing of the account itself, it would be obviously a harsh rule to enforce against the defendant, and make him liable for the excess of interest on the moneys received over the moneys expended, as the former must in time precede the latter. The case does not fall within the rule laid down in *Finch* v. *Ragland*, 2 Dev. Eq., 137, and affirmed in *McNeill* v. *Hodges*, 83 N. C., 504, and *Pickens* v. *Miller*, *Ib.*, 543, since the defendant kept his account, showing the sums collected and paid out, and the dates of each, and therefrom it is seen that no large sums remained in his hands unemployed for a considerable time, and which were applicable to the payment of debts. We therefore concur in this ruling of the court.

Exc. 10. For reasons already given, the defendant is rightfully charged with the true value of the shares of bank stock and the dividends derived therefrom.

Exc. 11. The exception to so much of the action of the referee and the concurrent ruling of the court, as makes the defendant liable for the debt due by W. J. Sloan in account, must be sustained, and for these reasons:

First. When the claim was presented by A. P. Rhine, the defendant's agent, Sloan denied his liability, asserting that the debt originated in a confederate transaction, though it bears date in the account as if contracted or due in 1867, and that besides, he had counter demands sufficient to meet the claim. This response was objected to by the plaintiffs, and the objection is valid if the declaration was called out to prove the fact asserted; but it was competent to show the demand and refusal to pay it, and the reasons assigned for the refusal.

Second. The defendant swears, and there is no contradictory evidence on the point, that the intestate had charge of the collections for the firm up to the time when mental infirmity supervened, a period of some two years, when, if capable of collection

it should have been collected, and the delinquency, if it exists, is common to both. But as this is not to be presumed, it is most reasonable to infer the inability of either to enforce the payment.

Third. The defendant, in his testimony, says that such was the condition of the debtor from 1867 up to his going into bankruptcy, that nothing could be made out of him; that the debt was a confederate debt and the debtor had offsets of equal amount.

Fourth. The debtor did subsequently, at which time does not appear, go into bankruptcy.

The force of these facts is not overborne by the debtor's reputation for solvency testified to by the plaintiff, Wilson, doubtful to say the least, and the production of the record of judgments recovered to his use. The bankruptcy remains as an established fact, and it supposes a previous insolvent condition of the debtor. Under these circumstances, the defendant, in our opinion, ought not to be held responsible for the loss.

Exc. 12. The proofs before us do not show an allowance for the selling the real and personal estate by any competent authority, so as to reduce the aggregate of the sales, or warrant a credit to the amount of the alleged allowance of $447. But this can scarcely be detrimental to the defendant, since the referee gives him commissions on the whole receipts, inclusive of the moneys derived from the sales, and if the allowance claimed were deducted, it would diminish the commissions by perhaps an equal or even greater amount. The exception is untenable.

Exc. 13. The interest is charged on the aggregate sales under a previous ruling, only from a date previous to which the entire sum had been distributed among the partners. The results of a withdrawal from a gross sum of the compensation for services in relation to the fund, are precisely the same as if interest were computed upon such gross sum to any given date, and then the same per centum of compensation be deducted from the whole amount of principal and interest.

Exc. 14. The defendant objects that he is charged with the

indebtedness of Leander Smith in the sum of $136.22. The objection is without force, as a brief reference to the facts will show.

First. The defendant is credited (voucher 33) with the payment of $55.25, a debt due to him by the firm, while it appears that Smith at the same time owed the firm $136.22, which ought to have been applied to its extinguishment. No reason is suggested why this was not done. These debts are entirely outside the sum paid to Smith under the award of arbitrators, and which, as the defendant explains, could not be discharged out of Smith's indebtedness to the firm.

Second. The defendant, in his examination, says this debt "is good as far as I know." If so, it ought to have been collected and accounted for.

EXCEPTION TO THE GUARDIAN ACCOUNT:

1. For that the defendant ought not to be charged with interest on the moneys received from the date of their reception.

The guardian's primary duty is to invest and take care of the funds, keeping them at interest. We discover no ground to support the exception, in the absence of any evidence or suggestion that the funds, or any part of them, remained in the defendant's hands unemployed, and without his fault. He does not testify that such was the case, and he must therefore assume the obligation of personal responsibility for interest, which, if he did not make, he ought to have made some effort to obtain.

EXCEPTIONS TO THE ADMINISTRATION ACCOUNT.

Exc. 1. This exception is in relation to the charge of interest, and must be overruled. The subject matter of it has been already considered.

Exc. 2. For that the referee has charged the defendant, as administrator, with $1,479.45, the amount of the note of A. B.

Davidson, instead of the sum necessary to re-imburse the estate for the amount paid in compromising the suit brought against defendant, as guardian, upon the gold deposit converted into the loan represented in the note. The transaction out of which this claim arises, is thus explained by the defendant in answer to an inquiry in regard to a payment to Sarah Beatty, executrix, of $1,100, voucher 52, in his own commissioner's account:

One Samuel Beatty came to the factory and said he had left $1,000 in gold in the safe for safe-keeping. Defendant opened the safe, found a package which Beatty recognized as his own, in which was a note signed by John S. Davidson for $1,000, payable to the firm. This, defendant proposed to surrender, but Beatty refused to take it, declaring that he would hold the firm responsible. Some time afterwards, defendant, as guardian, was sued for the deposit. Pending the suit and after several efforts, an agent of the firm induced one Brevard Davidson to take up his son's note, the son having become insolvent, and execute his own to L. Lineberger & Co., for the full amount of the other.

At the ensuing term of the court an agent of the firm effected a compromise with the plaintiff's (Beatty) agent, in which the firm paid $1,000 in gold. Afterwards, the entire amount of Brevard's substituted obligation was paid to the firm.

The substance of the contention is whether the excess of the sum collected of Brevard Davidson over that paid out in the compromise, should be credited to the partnership or to the intestate.

It must be assumed, as the intestate had charge of the business, and from the evidence, that he received and loaned out the gold, undertaking therein to act for the firm and not for himself personally as distinct from the firm. The firm, through its agent, defended the action, secured the debt by taking a new obligation in the name of the firm, and compromised and paid in gold the full amount of the deposit. As the intestate's estate never paid any part of the sum claimed, and was wholly exon-

erated by the active efforts of the firm, it would seem to be just that the partnership should have the fruit of its labors and as a compensation therefor.

We think, therefore, this item properly belongs as a credit in the commissioner's account, and should be eliminated from that of the administration. To this extent the exception is sustained.

Exc. 3. This exception to the charge of interest, on the balance due on the guardian and transferred to the administration account, from the date thereof, has been decided in principle in passing upon preceding exceptions.

Exc. 4. The credit must necessarily be the resultant balance ascertained only by an admixture of principal and interest, which are inseparably united in the one sum. There is no error in this.

Exc. 5. The claims embraced in vouchers 92, 98, 99, 101, 103, 110, 112, 114, 116, 119 and from 121 to 128 inclusive, are for defendant's service, hotel and travelling expenses in attending to the business, and sums paid an agent which fairly belong to the range of duties for which a remuneration is afforded in commissions allowed. *Morris* v. *Morris*, 1 Jones' Eq., 326. They were therefore properly rejected as additional claims.

Exc. 6. This exception is sustained. The defendant seems to have alone administered the estate, and as commissioners are to measure and compensate the services rendered, the *feme* plaintiff is not entitled to share with the defendant therein. *Grant* v. *Pride*, 1 Dev. Eq., 269.

The defendant files additional exceptions, designated by letters and not numbered, which must also be examined and disposed of.

Exc. A. The first exception is to the alleged vagueness of the findings of fact, and the failure of the referee to disclose the particulars which enter into and form the aggregate sum of $21,482.35. The referee declares that this sum was produced from sales of goods and collections of debts due the firm, and in the amounts specified in book 1, p. 301, *et seq.* There is

nothing indefinite in this form of the finding, and it is not intimated that the estimate is erroneous. We deem the matter wholly immaterial.

Exc. B. The defendant excepts to the finding, as solvent, and charging him with the following claims: Two notes of C. Rhine and L. A. Mason, each for $100; a note of C. Rhine, J. C. Lewis, and E. Pasour, for $500; two notes of J. L. Withers, one for $15.95, the other for $13.58; a note for $8.78; an order of R. J. Beatty for $30; an account against Leander Smith for $136.32; a judgment recovered of L. A. Mason for $495.32; another for the sum of $71; a third judgment against same for balance of $1,971.80.

a. The two notes first mentioned are reduced by scaling the one to $6.66 and the other to $11.11, and these sums are charged.

b. The defendant admits that the $500 due by C. Rhine, E. Pasour and J. C. Lewis could be collected of Pasour, and that the notes of Withers are solvent.

c. The defendant, as appears by voucher 1, in exhibit "X," claimed credit for a payment to R. J. Beatty of $535.23 while he held the claims against the debtor specified in the exception. They should have been used in lessening the debt of Beatty, and when asked why this was not done, the answer is, "I do not know, I cannot explain it." He is, therefore, clearly liable for the consequences of this neglect.

d. The indebtedness of Leander Smith has been already considered.

e. The several judgments recovered against L. A. Mason, as shown in the execution docket, on some of which payments are credited, and others from the sheriff's return, were not collected by order of the plaintiffs.

The only evidence in reference to these claims, so far as we can discover, is that furnished by an inspection of the execution docket, and from this it appears that large sums were collected, and sometimes in full. It is manifest, from the fact that they were prosecuted to judgments, that an effort to secure payment

was made, and it is not shown that more could, by greater diligence and activity, have been obtained than was in fact collected; and the personal interest of the defendant to the extent of one-fourth would seem to have been sufficient to impel him to make efforts to secure the whole debt. It is shown that he sanctioned the failure of the sheriff to make the money in three instances, in one of which he shortly after secured a payment of nearly one-half the debt, and subsequently nearly one-fourth additional. The indulgence may have been the essential means of securing so much.

But however this may be, we do not think, in the absence of all evidence of negligence, the defendant should be charged with more than he collected, and with the sums actually paid him he is of course chargeable.

Exc. C. This exception is to the accuracy of the referee's computation of interest, and a revision will be necessary on a second reference.

Exc. D. This is similar to the last.

Exc. E. The interest must be calculated on the sums collected from L. A. Mason previous to June 1st, 1873, from that date in accordance with a former ruling.

Excs. G, H, I, K, L, M, and N, are all to alleged erroneous reckonings of interest, and require no further comment.

Exc. O. The defendant charges himself with the sum of seven hundred dollars, a dividend declared and distributed to the members of the firm, in his *guardian* account, while the referee has transferred it to the administration account, and the objection is to the change. The entry bears date January 1st, 1871, and interest is computed from that time. The intestate died on January 14th, 1871, and this money became due, and the entry is made, as if paid, previously and during the guardianship. But we are unable to perceive, as the charge itself is not disputed, how the defendant can be prejudiced by its being placed on the one rather than the other account. In either case the sum is the same and the interest begins at the same time.

Exc. P. This exception is admitted by the plaintiffs to be well founded. The $259.55 enters into and forms part of the sum with which the defendant is charged ($2,876.75), in passing upon and sustaining the first exception of the plaintiffs. The interest, of course, follows the disposition of the principal. The other item and interest must be stricken out.

Exc. Q. This is an alleged error of computation to be revised by a future referee.

Exc. R. The allowance of commissions is sustained.

Exc. S. The defendant excepts to the method of computing interest on the Singer debt of $900. The defendant admits his collection of the entire note and his own account shows that $540 had been paid on it on January 17th, 1870. The testimony of the *feme* plaintiff, who delivered this note to the defendant, states that it was dated in 1866, and bore interest at the rate of eight per cent., and this meets with no correction in the examination of the defendant. It must be assumed, therefore, that the security was in the form and of the kind warranting this rate; and if not, that it was recognized and with this interest paid to the defendant. If it were otherwise, it behooved him to show the fact. But that rate ceased on the sum paid January 17th, 1870, and the defendant is only liable thereon from June 1st, 1873, at the legal rate of six per cent. This item must be reformed accordingly, and so far the exception is sustained.

Exc. T. Overruled.

Exc. U. This exception, embodied in a previous one, has been sustained as to the whole charge.

Excs. V, W, X, Y. Except so far as already decided, are overruled.

Exc. Z. There is no evidence in the record, and the vouchers for these payments to these members of the firm are not copied, so that we can see from an examination of their face when the moneys so paid were received. It is reasonable to infer that the vouchers do thus show the date of the several payments, as no controversy is made as to the asserted fact. But as interest is to

be counted from June, 1873, on the sums received and expended in the settlement of the firm accounts, this difference in date becomes unimportant.

Exc. Ya. Upon the same ground we sustain this exception, and the interest must be calculated from the time of the successive payments on the amount of each.

Exc. Zb. As we have already sustained the ruling of His Honor, that no interest on the receipts and disbursements is to be charged prior to June 1st, 1873, this exception has been neutralized and has become entirely immaterial.

We have treated this action as intended in its general scope and aim, to effect a settlement of the intestate's estate in the defendant's hands, and wholly administered by him, in order to ascertain their amount and recover the distributive shares therein accruing to the *feme* plaintiff and her infant child, of whom she is the appointed guardian; and not as one merely to enforce the specific contract entered into between the associated representatives for an account and the payment over of the trust fund by one to the other. The settlement of the administration is an execution of part of the contract, and both distributees are interested in the result. The infant distributee ought to be made a party to the suit, and must be before any final decree is rendered. This is due to the defendant for his protection against another suit at the instance of the infant distributee, protracted, expensive and harassing, and to the infant to secure his distributive share in the estate. We are not prepared to uphold the contract, in this feature, as one entitled to a specific enforcement, if its validity were now opened to question. But it would be manifestly unjust to leave the defendant exposed to a similar suit by the infant, or to deny to him the right to have judgment against the defendant for his portion of the trust estate.

The identity of interest between the distributees, and the additional relation of guardian and ward subsisting between them, furnish an assurance, if any were wanting, that the common interest of both has been faithfully guarded throughout.

We are not without fears, that, in the meagre evidence sent up which we are required to look into and determine its bearing and effect, we may have done injustice to one or both the parties in the conclusions sometimes arrived at upon its full consideration. But we must decide the case and all its points upon the transcript, and cannot go outside of its limits.

The cause must be remanded to the superior court, to the end that a reference may be there ordered, where it can be more conveniently executed, for the purpose of revision and reformation in the particulars pointed out in our rulings, and that the infant distributee be made a party in order to a final adjustment of the administration.

We do not deem this a proper case for costs, and each party will pay his own, and it is so adjudged. The costs of the printing of the record will be paid equally by the plaintiffs and the defendant.

PER CURIAM. Modified.

JOHN C. SINCLAIR v. MARGARET McBRYDE, Ex'x, and others.

Creditors' Bill—Executors and Administrators.

The petition of a creditor of a decedent for an order to compel the personal representative to sell land for assets to pay debts, is not demurrable upon the ground that all the creditors of the estate are not made parties plaintiff. Such a proceeding is in effect a creditor's bill, and gives the complainant no preference over any other debt of equal dignity.

(*Wilson* v. *Bank*, 72 N. C., 621, cited and approved).

SPECIAL PROCEEDING commenced before the clerk, and heard at Spring Term, 1882, of ROBESON Superior Court, before *Shipp, J.*

The proceeding was instituted by the plaintiff to compel the defendant as executrix of Angus Leach, deceased, to sell the land described in the complaint, of which the said Leach was seized at the time of his death, to make assets for the payment of his debts.

The complaint alleges that Angus Leach died in the county of Robeson in 1877, leaving a last will and testament, in which he devised the land to his wife, the defendant, Margaret McBryde, for her natural life, and after her death to the other defendant, Mary Wilkinson, and appointed the said Margaret executrix, who qualified as such before the probate court; that the plaintiff obtained a judgment in the superior court at spring term, 1880, for the sum of two hundred dollars, with interest; and the personal estate, as accounted for by the executrix, is wholly insufficient to pay the testator's debts, and that it is necessary that the land should be sold to make assets for that purpose, and the said Margaret refuses to sell the same or to file any petition for an order to do so. The prayer of the petition is that the land be sold by the executrix, &c.

The defendants demurred to the complaint upon the ground that the action is brought in behalf of J. C. Sinclair only, when it should be brought in behalf of the said J. C. Sinclair and all the other creditors of Angus Leach, deceased.

The demurrer was sustained by the clerk, and the plaintiff appealed to the superior court, where the judgment of the clerk was reversed, and the demurrer overruled, with leave to the defendants to answer, and defendants appealed.

Messrs. McNeill & McNeill, for plaintiff.
Messrs. French & Norment, for defendants.

ASHE, J. We are of the opinion there was no error in the judgment rendered by His Honor in the superior court. The proceeding, though not in form, is in substance and effect, in the nature of a creditor's bill.

The plaintiff does not seek to recover his debt alone out of

the land of the defendant's testator, but to make the land assets for the payment of all the debts of the testator; so that when the land is sold by the executrix and the proceeds of the sale collected, it will be assets in her hands for the payment of all the debts of her testator according to their dignities. The commencement of this proceeding by the plaintiff will give him no preference over any other debt of equal dignity. It is to all intents and purposes a proceeding in behalf of all the creditors of the decedent, and any creditor might have come in, and may yet come in and make himself a party plaintiff.

In the case of *Wilson & Sholer* v. *Bank of Lexington*, 72 N. C., 621, which was a civil action against the bank to recover the amount of certain bills issued as currency, it was held that it was not necessary to join as plaintiffs all persons holding bills of the bank, for being in the nature of a creditor's bill, such holders may at any time come in and be made parties and share the recovery. This case is analagous, and establishes the principle which governs the case before us. There is no error.

Let this be certified to the superior court of Robeson county that further action may be taken in the case according to law.

No error. Affirmed.

WILLIAM J. ROGERS v. JAMES W. GRANT, Adm'r.

Executors and Administrators, judgment against—Statute of Limitations.

1. A general judgment does not itself constitute assets to charge an administrator, and was properly refused in this case; but the plaintiff is entitled to judgment *quando*.

2. Creditors of an estate, who fail to make claim in seven years after the debtor's death, are not barred by the statute unless the administrator avers and proves that he has paid over the surplus in his hands to parties entitled. (This case is governed by the law in force prior to the Code).

ROGERS *v.* GRANT.

(*Ridley* v. *Thorpe*, 2 Hay., 343; *Jones* v. *Brodie*, 3 Mur., 594; *McKinder* v. *Littlejohn*, 1 Ired., 66; *Rayner* v. *Watford*, 2 Dev., 338; *Godley* v. *Taylor*, 3 Dev., 178; *Goodman* v. *Smith*, 4 Dev., 450; *Reeves* v. *Bell*, 2 Jones, 254; *Cooper* v. *Cherry*, 8 Jones, 323, cited, commented on and approved).

CIVIL ACTION tried at January Special Term, 1882, of NORTHAMPTON Superior Court, before *Graves, J.*

Eliza A. Phillips died in April, 1860, and J. M. S. Rogers qualified as executor to her last will and testament, but he died in April, 1874, without having settled the estate of his testatrix, and in June, 1876, the defendant, Grant, qualified as her administrator *de bonis non.*

At the time of her death, the testatrix was indebted to one Smith in a considerable amount, evidenced by bonds, set out in the statement of the case, which were endorsed to the plaintiff for value, who brought this action to recover the same—the summons being issued on the 17th of September, 1877. There are no other debts against her estate.

The defendant, Grant, soon after his appointment as administrator aforesaid (October 30th, 1876), commenced an action against W. J. Rogers (plaintiff in this suit), as administrator of said J. M. S. Rogers, for an account and settlement of the estate of said testatrix, and at fall term, 1878, recovered judgment for $5,182.04, with interest, &c., being the value of personal property of the Phillips' estate sold by her executor and the money collected by him upon notes due her estate. The judgment has not been paid, but the estate of J. M. S. Rogers is solvent.

These are in substance the facts found by the referee to whom the matter was submitted, which are deemed necessary to an understanding of the opinion, and upon them he found as a conclusion of law, that the said judgment, rendered at fall term, 1878, in favor of Grant, administrator, against Rogers, administrator, is assets in the hands of this defendant, belonging to the Phillips' estate. This was overruled by His Honor, who held that the defendant did not, at the time this action was com-

menced or at any time since, have in his hands any assets with which to satisfy the plaintiff's claim, but that there was an unadministered estate in his hands consisting of said judgment. Plaintiff excepted.

The defendant set up the plea of the statute (Rev. Code, ch. 68, § 11) barring claims against the estate of a decedent, unless made within seven years after the debtor's death.

Messrs. W. C. Bowen and *Mullen & Moore*, for plaintiff.
Mr. R. B. Peebles, for defendant.

SMITH, C. J. When this cause was before us on the former appeal from the ruling of the court, that the lapse of seven years since the plaintiff's cause of action accrued and the revival of the suspended statute of limitations before the bringing of the suit, was a barrier to the recovery, it was remanded "for a fuller statement of facts or other proceedings as the parties may be advised." [See 80 N. C., 487].

Upon a reference subsequently ordered in the superior court to ascertain what, if any, assets of the testatrix, were in the hands of the defendant at the time of instituting the suit, or of making the report, it is found by the referee that the defendant, as administrator *de bonis non*, recovered against the present plaintiff, as administrator of Joseph M. S. Rogers, executor of E. A. Phillips, at fall term, 1878, the sum of $5,182.04, with interest on $3,017.10, the principal money thereof, from September 30th, 1878, and costs—the unadministered residue of the estate of the testatrix in his hands; that no part of the judgment has been paid, but it is a solvent debt and in course of legal enforcement. There are no other debts, besides those in this suit, due from the estate of the testatrix. The referee charges the defendant with assets applicable to the plaintiff's demand, and sufficient to discharge it, which ruling, upon exception, was reversed by the court, and thereupon the plaintiff moved for judgment *quando* against the defendant, which motion was refused.

The plaintiff's appeal raises two questions for solution:

1. Was the plaintiff entitled to a judgment fixing the defendant with assets? If not,

2. Is he entitled to a judgment of assets *quando acciderint?*

I. The refusal of the motion for a general judgment was clearly right, for the reason that the judgment recovered, however assured of future satisfaction, does not itself constitute assets to charge the representative, and only becomes such as its fruits are realized in actual payments, and can be made available in the discharge of the decedent's liabilities.

II. The defendant relies upon the act of 1715, which declares that "creditors of any deceased person shall make their claim within seven years after the death of such debtor, otherwise such creditors shall be forever barred" (Rev. Code, ch. 65, § 11), as precluding the entry of a judgment in any form against himself.

The construction of this statute and the extent of its operation have been frequently before the court, and the decisions are not in harmony.

In *Ridley* v. *Thorpe*, 2 Hay., 343, it is declared that the act "makes no saving whatsoever for any person under any circumstances," not even in favor of infants and *femes covert*, and that "where the legislature have made no exception, the judges can make none."

In *Jones* v. *Brodie*, 3 Murp., 594, TAYLOR, C. J., declares that to put this statute in motion, there must have been some one capable of suing when the defendant died, though the death of the plaintiff afterwards, without an administration on his estate, would not arrest its running. To same effect is *McKinder* v. *Littlejohn*, 1 Ired., 66.

In *Rayner* v. *Watford*, 2 Dev. 338, it was decided that the statute did not operate to bar an action upon a debt not due, and as there must be one capable of bringing suit, so there must exist a cause of action; and the period of limitation, when the cause of action accrued after the debtor's death, must be counted from

the time when suit could be brought. This was again ruled in *Godley* v. *Taylor*, 3 Dev., 178, though with a strong dissenting opinion from RUFFIN, J., in both cases.

In *Goodman* v. *Smith*, 4 Dev., 450, after a full and careful examination, GASTON, J., delivering the opinion of the court, declares, that the act of 1789, barring creditors in two years, is a defence to the debt given to the next of kin as well as the personal representative. This case is overruled by the court, PEARSON, J., delivering the opinion, in *Reeves* v. *Bell*, 2 Jones, 254, and it is declared that the two years' delay affords no protection to the representative, unless he has taken refunding bonds in paying over to the legatees or next of kin, or where he retains the funds in his hands. This ruling is re-affirmed in *Cooper* v. *Cherry*, 8 Jones, 323, where the subject is fully reviewed, and the general conclusion arrived at, in the interpretation of both statutes, announced in these words: "It is settled, that notwithstanding the broad terms of the act of 1715, an executor or administrator cannot protect himself from a recovery by a creditor, who had failed to sue until after the expiration of seven years, unless he avers and proves that he has paid over the surplus assets to the treasury, as required to do by the act of 1784, or to the trustees of the University, by the act of 1809; and the court adopt the principle that in the construction of the act of 1715, the ninth section of that act, and the acts of 1784 and 1809 are to be taken into consideration, and that one who fails to do an act which the law requires of him for the benefit of another, cannot bar the recovery of the latter, because he has not provided him with the remedy over which the law contemplated and made it his duty to do, as an implied condition precedent to the protection which he claims." This is added: "We now consider the question settled, both on principle and authority."

The ruling applies with greater force to the present case, where the defendant has not dispossessed himself of the funds, but is

pursuing them, and when recovered he will hold them to be applied in a due course of administration.

Without inquiring as to which of these conflicting adjudications is most consonant with the terms and intent of the statute, which gives repose to estates of deceased debtors after a limited time, and protects them from demands, we do not feel at liberty, after more than twenty years of acquiescence in the law as laid down in the later, to disturb it and re-open the controversy. We pursue this course in recognition of the necessity of maintaining the rule *stare decisis* in support of existing rights and interests, which may have grown up upon it, and because cases requiring its application are diminishing in number in consequence of the substitution of the limitations prescribed in the Code.

We direct our attention solely to the exceptions of the appellant, but it is not inappropriate to say, that we see no error in the course adopted by the court in ordering the reference as to the assets, information in regard to which was necessary in determining the character of the judgment to be entered.

We think the plaintiff is entitled to the judgment *quando*, and there was error on the part of the court in refusing to render it.

As further proceedings may hereafter become necessary to subject future acquired assets, when received by the defendant, we remand the cause, that judgment may be entered in the court below in accordance with this opinion.

Error. Reversed.

J. H. BLOUNT, Adm'r, v. WILLIAM PRITCHARD and others.

Executors and Administrators—Petition to sell land for assets.

1. A petition to sell land for assets must contain the essential statement that there is an *insufficiency of assets* to pay the decedent's debts, together with

the amount of debts and the value of the personal estate, as far as can be ascertained.

2. The petition may be filed at any time after the administrator ascertains that there is an insufficiency of assets.

3. License to sell may be granted, even if there has been no application of the personal estate to the debts; but if there has been an application, the petition should so state.

(*Wiley* v. *Wiley*, 63 N. C., 182; *Bland* v. *Hartsoe*, 65 N. C., 294; *Graham* v. *Little*, 5 Ired. Eq., 407; *Finger* v. *Finger*, 64 N. C., 183; *Shields* v. *McDowell*, 82 N. C., 137, cited, distinguished and approved).

SPECIAL PROCEEDING commenced before the probate court and heard upon demurrer at Spring Term, 1882, of PASQUOTANK Superior Court, before *McKoy, J.*

The plaintiff, as administrator of J. C. Pritchard, deceased, seeks to sell the land of his intestate for the payment of debts, and filed his petition against the heirs of the intestate in the probate court for Pasquotank county, for license to sell the lands descended to them.

The petition states, "that the debts outstanding against the estate of the said J. C. Pritchard amount to about nine hundred dollars, and that the value of the personal property belonging to the estate is not more than five hundred dollars. The defendants demur to the petition and assign as causes thereof:

1. That the petition does not show the application of the personal estate to the debts of the plaintiff's intestate.

2. That it does not show that the personal estate of the intestate has been exhausted.

3. That it does not show that the personal estate has been made assets according to law.

The demurrer was overruled and the defendants appealed.

Messrs. Pruden & Shaw, for plaintiff.
Messrs. Grandy & Aydelett, for defendants.

ASHE, J. The statute authorizing the sale of land to make assets for the payment of debts (Bat. Rev., ch. 45, § 61) provides,

that when the personal estate of a decedent is insufficient to pay all his debts, including the charges of administration, the executor, administrator or collector may, at any time after the grant of letters, apply to the superior court of the county where the land or some part thereof is situated, by petition, to sell the real property for the payment of the debts of such decedent.

SEC. 62. The petition, which must be verified by the oath of the applicant, shall set forth, *as far as can be ascertained*,

1. The amount of debts outstanding against the estate.

2. The value of the personal estate and the application thereof.

3. A description of the legal and equitable real estate of the decedent, with the estimated value of the respective portions or lots.

4. The names, ages, and residences, if known, of the devisees and heirs-at-law of the decedent.

The cases of *Wiley* v. *Wiley*, 63 N. C., 182, *Bland* v. *Hartsoe*, 65 N. C., 204, relied upon by the defendant to support his demurrer, upon the ground that the petition does not state that the personal estate had been exhausted, were cases where the executor or administrator had been guilty of a *devastavit*, and the case of *Graham* v. *Little*, 5 Ired. Eq., 407, also cited for the same purpose, was a case where the testator had authorized his executors to sell any part of his real estate that they might think proper, and the executors sold the land and applied a part of the proceeds to the payment of the debts; it was held they had no right to do so, for that, the land not being charged with the payment of the debts, the personal estate must first be exhausted before they could resort to the land. In all of these cases, it was not made to appear that the personal estate, if properly administered, was insufficient to pay the debts.

It is the insufficiency of the personal estate of a decedent to pay his debts which is the essential fact that gives jurisdiction to the probate court, and imposes upon the representative the duty of applying for leave to sell the real property.

In *Finger* v. *Finger*, 64 N. C., 183, it is held that "on a petition to sell lands of a deceased person, the administrator must satisfy the court, either that the personal estate has been exhausted in the payment of debts, and that others are due, or that it will be clearly insufficient for that purpose."

In *Shields* v. *McDowell*, 82 N. C., 137, Judge DILLARD says, in relation to Bat. Rev., ch. 45, § 61: "In construing this section, in connection with the clause of the section requiring a statement in the petition of the amount of the personalty and its application, we think the meaning of the statute is, that the power and duty to apply for a license exist whenever insufficiency occurs, and can be shown forth in the petition, whether presently or remotely, after the grant of letters, or before or after a full application of the personal assets." In that case there had been an application, in part, of the assets of the testator to his debts, and the judge was no doubt speaking in reference to the facts of the case, when he said license to sell might be granted "before or after a full application of the personal assets." For we think the proper construction of the statute is, that license may be granted even if there has been no application of the assets; but if there has been an application, it should be stated that the court may see that there has not been a misapplication.

The statute expressly provides that in case of an insufficiency of assets, the personal representative may *at any time* after the grant of letters, apply for the license; and if he may apply *at any time*, he may do so just so soon as he ascertains there is an insufficiency, and before he can possibly convert the personal estate into money, and make an application of it to the debts. As under the present plan of administration the assets must be applied *pro rata* to the several classes of debts according to their priorities, we do not well see how any application can be safely made, before an administrator ascertains what amount of assets he will have to apply.

The main and essential fact to be stated in the petition is, that there is an *insufficiency of assets* to pay the debts, and that the

court may know this, the statute requires a statement of the amount of the debts and the value of the personal estate; but these statements are not required to be made with exact particularity, but only "*as far as can be ascertained*," for these italicized words used in section 62, according to grammatical construction, qualify each of the sub-divisions of that section.

There is no error in His Honor's judgment in overruling the demurrer.

Let this be certified to the superior court of Pasquotank, to the end that a *procedendo* may be issued to the probate court of that county, to proceed upon the petition for the sale of the land as prayed for.

No error. Affirmed.

MARION BROOKS v. MARTHA L. HEADEN and others.

Executors and Administrators.

No debt being shown to exist against the defendant's intestate at the comencement of the action; *Held*, that the plaintiff could not maintain it. Suggestion as to the proper course of procedure to satisfy plaintiff's demand.

(*Bryant* v. *Fisher*, and cases cited, 85 N. C., 69; *Alexander* v. *Robinson*, *Ib.*, 275; *Bank* v. *Harris*, 84 N. C., 206; *Williams* v. *Green*, 80 N. C., 76, cited and approved).

CIVIL ACTION tried at Fall Term, 1882, of CHATHAM Superior Court, before *Shipp, J.*

The plaintiff on May 12th, 1856, conveyed certain personal estate then owned by him to Aaron D. Headen, in trust to secure the several debts therein specified, and with authority to sell and apply the proceeds to their payment if not discharged by himself before the 1st day of the same month in the year following.

The trustee died in 1858 or 1859, having executed and published his will thereafter admitted to probate, and appointed Andrew Headen and Thomas A. Brooks executors, both of whom qualified as such.

On November 16th, 1871, the plaintiff brought suit against the said executors for an account and settlement of the trust estate in the hands of their testator, in the superior court of Chatham, wherein, upon a reference and report, it was ascertained that there was due and unappropriated the sum of $399.81 on May 20th, 1876, for which, with interest from that date, the plaintiff recovered judgment at fall term, 1878, against the executors, and they were charged with assets of the testator sufficient to pay the same.

There were exceptions taken to the referee's account, from the rulings on which and the judgment consequent thereon, the defendants took an appeal. On the hearing in this court (80 N. C., 11) it was declared that the secured creditors unpaid should have been made parties, and the cause, without adjudication upon the merits, was remanded, to the end that these creditors should be brought in and opportunity given them to abide by the proceedings or re-open the account, and, if necessary, have another reference with leave to the appellants in the former case again to appeal, and present the rulings upon their exceptions for review.

Upon the return of the cause to the superior court, some of the creditors came in and admitting their debts to have been satisfied, declined to become parties, and others were made parties according to the course of the court, by publication, and failing to answer, judgment by default was entered against them.

On September 6th, 1879, Andrew Headen died intestate, and letters of administration on his estate issued on April 15th, 1881, to the defendant, Martha A. Headen.

At spring term, 1881, it was declared and ordered by the court "that the judgments heretofore rendered in this action at fall term, 1877, and at fall term, 1878, be and the same are hereby affirmed and directed to be entered, *nunc pro tunc*, as the judgments of this court, and that the plaintiff, Marion Brooks, recover

of Thomas A. Brooks, surviving executor of A. D. Headen, deceased, the sum of three hundred and ninety-nine 31½-100 dollars, with interest from March 20th, 1876, and the costs of this action to be taxed by the clerk, including an allowance of fifty dollars for taking the account."

The present action, begun on February 15th, 1882, against the defendants (the widow, administrator and heirs-at-law of the intestate Andrew Headen), is prosecuted to charge him personally and his estate with the sum of $377 3-10 and interest, the unpaid portion, as we understand, of the judgments rendered, and to pursue and subject thereto certain real estate alleged to have been fraudulently disposed of by the intestate, with intent to place it beyond the reach of his creditors, but which is justly liable to their claims.

Several issues were framed from the controverted allegations in the pleadings, of which the first is in these words:

1. Did the plaintiff, at the commencement of this action, have a debt against the intestate of defendant, Martha A. Headen?

The other issues were as to the amount, its payment, the bar of the statute of limitations, and the four last, as to the fraudulent conveyances charged in the complaint. These being dependent upon the first, and the finding on that being adverse to the plaintiff, it is unnecessary to set them out in detail.

Upon the introduction of the record of the former action, as the only evidence of the alleged indebtedness, the court instructed the jury to find the first issue in the negative, and not to consider the evidence upon the others; and upon the rendition of the verdict and judgment for the defendants, the plaintiff appeals.

Mr. John Manning, for plaintiff.
Mr. J. H. Headen, for defendants.

SMITH, C. J., after stating the case. There can be no question of the correctness of the ruling, that the record did not show any debt judicially ascertained and declared against the intes-

tate personally. The judgment fixes the liability of the trustee, Aaron D. Headen, and the possession by his executors of assets sufficient to discharge it, and if it cannot be satisfied from them, it may become personally their own debt by a proper proceeding for the *devastavit*. Until this is done, the judgment is against the defendants in their representative capacity, and to be satisfied out of the effects of the testator.

Original letters testamentary having issued prior to July 1st, 1869, the character of the judgment is determined by the law as it existed before the act of April 6th, 1869, went into operation. This is settled by the case of *Williams* v. *Green*, 80 N. C., 76.

If it were governed by the present law, the question of assets would be left open and the judgment would only ascertain the debt, "unless the personal representatives by pleading expressly admit assets." Bat. Rev., ch. 45, § 95.

If the judgment against the executors had been made a personal judgment against the intestate executor, Andrew Headen, during his life-time, the present suit could be maintained, upon the insolvency of his personal estate, and the fraudulently alienated real estate, pursued, if the administratrix refused to apply for license to sell, and subjected to the payment of the intestate's debts. But the plaintiff does not appear in the attitude of a creditor of the intestate, not having taken the steps to make his judgment such, and he cannot proceed unless he does.

We do not mean to intimate that the plaintiff may not in the same action obtain a personal judgment and then pursue his remedy against the intestate's estate, personal and real, in their proper order, for its satisfaction; and if such was the object of the present action, it is not presented in any of the framed issues, and it is the fault of the plaintiff that none others were before the jury, and he cannot complain. *Kidder* v. *McIlhenny*, 81 N. C., 123; *Curtis* v. *Cash*, 84 N. C., 41; *Bryant* v. *Fisher*, 85 N. C., 69; *Alexander* v. *Robinson*, *Ibid*, 275; *Bank* v. *Harris*, 84 N. C., 206.

We are called upon to review the errors assigned, and so appearing in the transcript; and, confined to the exercise of this appellate jurisdiction, we find no error in the ruling that no debt is shown to exist against the intestate at the commencement of the action, and unless there was such debt the other matters of inquiry are wholly immaterial, and the jury were properly discharged from passing upon issues that only involved them. There is no error and the judgment must be affirmed.

No error. Affirmed.

W. H. MORRIS and others v. ANDREW SYME, Administrator.

Statute of Limitations—Executors and Administrators—Parties.

1. Creditors of a deceased person, whose claims were due at the death of the debtor, are barred after seven years next after letters granted; provided the estate has been fully administered.
2. Whether, in the event of the death of an administrator, a creditor of the intestate can maintain an action against the sureties on the bond by making the administrator *de bonis non*, also, a party defendant (?).

(*Conrad* v. *Dalton*, 3 Dev., 251; *Ferebee* v. *Baxter*, 12 Ired., 64; *Walton* v. *Pearson*, 85 N. C., 34; *Godley* v. *Taylor*, 3 Dev., 178; *Cooper* v. *Cherry*, 8 Jones, 323; *McKeithan* v. *McGill*, 83 N. C., 517, cited and approved).

CIVIL ACTION tried at June Term, 1882, of WAKE Superior Court, before *MacRae, J.*

This action, begun on the 12th of July, 1881, is brought upon an administration bond given in 1860, and the defence relied on is the statute of limitations.

The facts are as follows: In 1858, one Cannady Lowe was appointed guardian of the plaintiffs, W. H. and James M. Morris, and of Susan Johnson, the intestate of the plaintiff, A. J. Morris, and gave bond whereon Hugh E. Lyon was one of his

sureties. Lyon died in January, 1860, and Lowe became his administrator, and gave bond with one George M. Trice as his surety.

This latter bond is the one sued on, and the breach assigned is that Lowe, as such administrator, took into his hands, at the time of his qualification, assets of the estate of his intestate to the amount of $17,838.79, which he wasted and misapplied.

In 1869, an action was instituted by the solicitor of the district upon the said guardian bond first mentioned, against the said Lowe, as administrator of Hugh E. Lyon, and at spring term, 1871, judgment was rendered for $11,412.

Trice, the surety on the administration bond (the one sued on), died in 1871, and B. Y. Rogers became his administrator, who, after having advertised according to law and having fully administered the estate, filed his final account before the probate court, in April, 1874, and was discharged therefrom.

Subsequently Rogers died, and the defendant, Syme, became the administrator *de bonis non* of the intestate Trice. Cannady Lowe is dead, and the defendant is his administrator, and also the administrator *de bonis non* of Hugh E. Lyon, and is before the court in both capacities, though no relief is asked against him in either.

The judge held, inasmuch as the claim was not presented, or the action begun, until more than seven years had elapsed after the death of Trice and the qualification of Rogers as his administrator, and after the full administration of the assets by him and his final settlement and discharge, that, as to this estate, the plaintiffs' cause of action was barred, and gave judgment accordingly, from which the plaintiffs appealed.

Messrs. Lewis & Son and *Argo & Wilder*, for plaintiffs.
Messrs. Battle & Mordecai, for defendant.

RUFFIN, J. If driven to decide the question, the court might

find some difficulty in sustaining the right of action which the plaintiffs have undertaken to assert in this case.

They sue upon the bond which was executed by the first administrator on the estate of Hugh E. Lyon, deceased, and complain of a *devastavit* committed by that officer. So that, as to the estate of the defendant's intestate, Trice, who was surety on that bond, they occupy the relation of creditors merely; and it has been frequently declared in this court, that in no case can a creditor, in the event of the death of an administrator, sue the sureties on his bond in an action at law; but that, that right inures only to an administrator *de bonis non* of the intestate, upon whom alone devolves the duty of settling the unadministered assets. *Conrad* v. *Dalton*, 3 Dev., 251; *Ferebee* v. *Baxter*, 12 Ired., 64.

In *Walton* v. *Pearson*, 85 N. C., 34, the question arose as to whether this difficulty on the part of a creditor could be overcome by his making the administrator *de bonis non* a party defendant with the surety on the bond, but it was not found necessary to decide it. Neither is it necessary that we should decide it now, since, in the opinion of this court, the case is certainly with the defendant upon the plea of the statute of limitations.

In their argument, the counsel treated the case as coming within sub-division 2 of section 32 of the Code of Civil Procedure, and really it matters but little whether we so consider it, or as falling under the act of 1715 (Rev. Code, ch. 65, § 11) for, as expounded by the courts, either statute would give complete protection to the defendant under the facts as they are found to exist in the case. But, inasmuch as the execution of the bond sued on and the breach complained of both preceded the adoption of the Code, the case is clearly to be governed by the latter statute.

That statute provides that creditors shall make their claim within seven years after the death of their debtor, or be forever barred; and according to every interpretation which has been put upon its terms, it works a complete bar to every demand,

due at the death of the debtor, upon which suit is thereafter delayed for seven years, provided it shall appear that in the meantime the estate has been fully administered, so that nothing remains in the hands of the administrator, with which to satisfy the claim. *Godley* v. *Taylor*, 3 Dev., 178; *Cooper* v. *Cherry*, 8 Jones, 323; *McKeithan* v. *McGill*, 83 N. C., 517.

In our case, the demand was due at the death of the debtor; seven years or more have elapsed, the entire estate has been fully administered, and the administrator, after filing his final account, has been discharged under a decree of the court; so that, every requirement is found to exist in the case, which is held to be necessary to render the statute a complete bar to the demand of the plaintiffs.

No error. Affirmed.

C. W. BEVERS, Adm'r, v. B. F. PARK and others.

Statute of Limitations, right of heir to plead—Executors and Administrators—Legislative Power.

1. The statute of limitations may be pleaded by the heir against a debt of the ancestor, in a proceeding by the administrator for license to sell the descended lands for assets to pay the same. The admissions of the administrator that the debt is just, and his declining to set up the statute as a defence, do not operate to deprive the heir of this right: there is no privity between him and the heir.

2. Whether the heir is bound by a valid subsisting judgment against the administrator, and to what extent he may contest the validity of the demand upon which such judgment is founded, (?).

3. The court intimate that the legislature has no power to revive a claim to which the bar of the statute has once attached. The act of 1881, ch. 80, discussed by RUFFIN, J.

(*Baker* v. *Webb*, 1 Hay., 43; *Thompson* v. *Cox*, 8 Jones, 311, cited and approved).

BEVERS *v.* PARK.

SPECIAL PROCEEDING for license to sell land for assets, commenced in the probate court, and heard at June Term, 1882, of WAKE Superior Court, before *MacRae, J.*

The defendants appealed.

Messrs. Merrimon & Fuller and *A. Jones*, for plaintiff.
Messrs. Fowle & Snow and *S. G. Ryan*, for defendants.

RUFFIN, J. In September, 1869, Alsey Bevers died intestate, leaving the plaintiff and the defendants, Fanny C. Park and Atlas A. Bevers, his only heirs-at-law and next of kin. In October of the same year the plaintiff became his administrator, and on the 26th day of May, 1874, begun this proceeding in the probate court of Wake county, for the purpose of making real estate assets for the payment of the debts of his intestate.

After issues before the clerk, the cause was removed into the superior court to be heard at term time, and then, with the consent of parties, it was referred to Mr. Joseph B. Batchelor, under the Code, to hear and determine all the issues involved. Many points were taken before the referee and upon exceptions to his report before His Honor below, but, as in this court the cause was made to turn upon the statute of limitations, which defence had been set up in the answer, only so much of the case need to be stated as will enable that matter to be understood.

With reference to it, the facts are: That the intestate was possessed of a very small personal estate, which was duly administered, though no part of it was applied to the payment of his debts. Soon after his qualification as administrator, the plaintiff himself paid, with a single exception, the debts of his intestate, which, so far as appears in the case, were simple contract debts, the last payment having been in 1871. The only debt unpaid by him, and which has never been paid, was on a bond for sixty dollars, given to one Haywood, on the 1st of January, 1856. This was presented to the administrator within a year after his qualification, and filed with, and admitted by him as a

just and subsisting debt. Afterwards, in 1871, suit was brought upon it and judgment rendered against the plaintiff in a justice's court, and since then no further steps have been taken to enforce its payment.

The defendants contend that this debt is barred by the statute, and should not, therefore, be allowed as a subsisting debt against the estate of their ancestor.

The plaintiff, on the other hand, declines to plead the statute as to this claim, and insists that the defendants cannot do so in a proceeding of this nature.

This question the referee deemed it unnecessary to decide, holding that the debt was not, in fact, barred by reason of the act of 1881, ch. 80, which, in effect, provides that upon the presentation of a claim to an administrator, and its admission by him, within one year from the date of his qualification, the statute shall be stopped thereon; and holding further, that this statute was intended to operate, and did operate, retroactively, and so as to revive this claim, though enacted more than seven years after the rendition of the judgment by the justice. This view of the statute was also taken by the judge below, and his ruling thereon is the subject of one of the defendants' exceptions.

As regards the debts paid by the administrator, and for which he now seeks to re-imburse himself by a sale of the lands, the referee finds, and it is conceded, that none of them were paid within seven years next before the commencement of this proceeding. The defendants thereupon contend, that by making such payments the plaintiff became a simple contract creditor of the estate of his intestate, and that his claims are, therefore, barred by the statute; but the referee, as well as the judge, ruled against them upon this point also, to which they further except.

The right of the heir, as against creditors, or the administrator representing them, to rely upon the statute of limitations as a defence of his own, when efforts are made to sell the lands descended to him for the debts of his ancestor, seems never to have been directly considered or adjudicated by this court. Still,

as we conceive, principles have more than once been enunciated, from which the existence of such a right in the heir is fairly deducible.

Speaking of the relations subsisting between the parties after the statute had made lands in the hands of the heir liable to the payment of debts, it was said in *Baker* v. *Webb*, 1 Hay., 43, that the same distinction between real and personal property was to be kept up as before; that lands, upon the death of the ancestor, descend to the heir, just as the personal chattels go to the administrator, and are no more to be affected by an action or judgment against the administrator, than the personal estate in the hands of the latter would be affected by a judgment against the heir; for, it was added, their interests and rights are totally distinct and separate.

In reference to the same point, the late Chief Justice PEARSON declared, in *Thompson* v. *Cox*, 8 Jones, 311, that when the administrator makes his application to the court to sell lands for assets, he is the representative of the creditors, and that the only adversary interest in the proceeding is that subsisting between himself and the heir.

If this, indeed, be so, and the administrator should really stand in such relation to the creditors as renders him their peculiar agent, while he antagonizes the right and claim of the heir, must it not necessarily follow that the latter must be left to make his own defence, free from the interference or dictation of the administrator? In such a proceeding, the very first question to be determined is, what debts are due from the estate of the intestate? and by the term *debts* are meant subsisting valid claims, and not such as are barred by the statute, or are presumed to have been paid. To hold otherwise, would present the singular anomaly of allowing a party to prescribe to his adversary the terms and extent of the defence which he should make, and would literally be, to first bind the heir, and then take from him his inheritance.

We are not, however, without authority upon the question,

derived from the adjudications of other courts, and which seem to our minds to be conclusive in regard to it.

In *Mooers* v. *White*, 6 Johns., Ch. Rep., 360, the very point was presented, as to the right of the heir, without the concurrence of the personal representative, to set up the defence of the statute when sued by a creditor of his ancestor, for the purpose of subjecting his lands to the payment of debts, and after great consideration was decided in favor of such right. In considering the question, the late learned Chancellor KENT declared that it seemed to him to be a principle of manifest justice, that no acknowledgment or admission by an executor or administrator ought to affect the real assets in the hands of the heir, or take from him the right to plead the statute of limitations, or make any other defence that his ancestor might have made if sued at the same time with himself; that it is only by virtue of an order of the court, and not *virtute officii*, that the personal representative could sell the land at all, and in such case his authority is derived entirely from the order, and without his having any estate or concern in the land itself.

In *Shewen* v. *Vandenbout*, 1 Russell and Mylne, 347, the Master of the Rolls carried the principle still farther, and, in an administration suit in which a creditor sought to prove a debt barred by the statute, permitted a *residuary legatee* to set up that defence, notwithstanding the executor expressly refused to do so. And upon an appeal taken to the Chancellor (LORD BROUGHAM), this decision was affirmed.

In *Briggs* v. *Wilson*, 5 DeGex., M. and G., 12, the executor, when the claim was presented to him, wrote to the creditor that he believed it to be just and should not, therefore, dispute it, and afterwards, in a creditor's administration suit, declined to set up the statute; it was held, that as to the personalty the statute did not bar the demand, but that as to the realty it was different; and the decision is put expressly upon the ground that hitherto, in an action by a creditor to sell the land of his debtor, the devisee, or heir, was a necessary party and might have pleaded the stat-

ute, and that it was not to be supposed that the courts and the legislature intended to take away this right, merely because they had given to the creditor a cheaper and more convenient remedy.

In *Riser* v. *Snoddy*, 7 Ind., 442, the supreme court of that state held, that to a petition by an administrator to sell real estate for the payment of debts, the heirs might plead that the debts were barred by the statute, or any other lawful plea in defence. In answer to the objection that the administrator was presumed to know better than the heirs about the validity of claims against the estate, and that it was in his discretion to set up the defence of the statute or not, the court observed, that the object of the proceeding was to deprive the heirs of their land, and that it was but reasonable they should be permitted to resist the suit and save their land if legally possible. Why else, it was asked, did the statute require that the heirs should be made parties to the action, unless it was intended that they should resist it? And if to resist, why should they not be allowed to avail themselves of all the rules of pleading, practice, and evidence, necessary for the purpose? A similar decision was made by the same court in *Jennings* v. *Kee*, 5 Ind., 257.

In *Steele* v. *Steele*, 64 Ala., 438, after an able and elaborate review of all the authorities affecting the question, that court held that in a proceeding to sell his lands, the heir was at liberty to dispute any and every debt that might be presented against the estate of his ancestor, and might set up every defence thereto which was legally sufficient. The decision rests upon the ground that there is no privity between the administrator and the heir, and hence the former cannot bind the latter by either his admissions or omissions; that while, by omitting to plead the statute or by an express promise to pay, he could revive a claim so as to charge the personal assets, he has no such power over the real assets, which descend directly to the heir, as to whom all his acts are *res inter alios*.

Controlled by the weight of these authorities, and being fully satisfied of the justice of the conclusion to which they conduct

us, this court does not hesitate to express the opinion that the defendants should have been allowed to plead the statute of limitations to all the claims, preferred against them, as charges upon the lands of their deceased father. If such a defence for the heir were proper to be made in any case, in none could it possibly be made with more propriety than in the present, in which the administrator is himself the creditor, and, instead of shielding the estate intrusted to him from the payment of stale claims, is seeking for his own advantage to enforce their collection at the expense of the heir.

Even as regards the personal estate, the administrator was never allowed to occupy a higher or better ground than a creditor of the same dignity, and when allowed by law to retain for his own demands upon his intestate, he was never permitted to retain for a debt which, as a creditor, he could not recover at law; consequently, he could not retain a debt due to him personally, when it was barred by the statute in the life-time of his intestate. *Rogers* v. *Rogers*, 3 Wend., 503.

It is not necessary that we should decide, nor do we undertake to do so in this case, how far the heir may be bound by a valid subsisting judgment against the administrator, or to what extent he may contest the validity of the demand upon which it is founded. For however these matters may be, if in any case the heir can be at liberty to plead the statute, he must be so, when as in this case the only judgment against the administrator is itself, and as a judgment, barred by the lapse of more than seven years from the date of its rendition by the justice. C. C. P., § 32. It is now the subject of contention between the parties, and must be subject to any objection that lies against it in its present shape.

Nor is that judgment saved from the bar of the statute by force of the act of 1881. That act purports to amend section 13 of the Code, which provides that in case of the death of a debtor before the expiration of the time limited for the commencement of an action against him, it may be brought against

his representative after that time, and within one year after granting letters upon his estate, and the only effect of the amendment is to introduce a further provision, that should a claim thus situated be presented to the administrator within the time specified in the main act, and be admitted by him, it shall not be necessary to sue upon it in order to stop the running of the statute. Admitting then, the fact that the judgment in this case was completely barred at the date of the enactment, and conceding, what we are far from believing to be true, that the legislature may by a general law revive a claim to which the bar of the statute has once attached, we are still completely at a loss to perceive its application to this case, in which the judgment is against the administrator himself, who alone could be sued in a direct action upon it, and he is still living. The case is, therefore, not such a one as is provided for in the statute, and does not come within its mischief.

The opinion of the court, based upon the facts as found by the referee and the judge below, is, that all the claims mentioned in the proceeding as debts due from the plaintiff's intestate, are barred by the lapse of time, and should have been so declared upon the plea of the defendants; and that no license to sell the lands of the intestate should have been granted to the plaintiff.

The judgment of the court, therefore, is that the action be dismissed, and that the defendants go without day.

Error. Judgment accordingly.

ANDREW SYME, Adm'r, v. WILLIAM D. RIDDLE.

Husband, entitled to earnings of wife—Statute of Limitations, right of fraudulent donee to plead.

1. A husband is entitled *jure mariti* to the services and earnings of the wife: the constitution of 1868 and the "marriage act" do not have the effect of changing this rule of law.

2. The statute of limitations may be pleaded by a fraudulent donee of the intestate, in a proceeding by the administrator for license to sell lands for assets to pay the debt of the intestate. (See preceding case).

(*Baker* v. *Jordan*, 73 N. C., 145, cited and approved).

SPECIAL PROCEEDING heard at Spring Term, 1883, of WAKE Superior Court, before *Philips, J.*

This is a proceeding begun before the probate judge for the purpose of making real estate assets, and after issues joined it was certified to the superior court.

It is conceded that the plaintiff's intestate left no personal property, and that she owned no real estate except that described in the complaint. She died in 1874, and the plaintiff qualified as her administrator in 1878. Shortly before her death, she conveyed the land to the defendant in fee simple, but the plaintiff insists that this was done with the intent to defraud her creditors, and therefore the conveyance was void. The defendant denies this, and also, that the intestate was indebted to any one at the time of her death, and for a further defence relies upon the statute of limitations.

When the cause was called for trial, the plaintiff requested the court not to submit an issue to the jury as to the statute of limitations, insisting that no one but the administrator could avail himself of that defence, and especially that a fraudulent donee could not do so. His Honor, however, overruled the motion, and submitted such issue, to which the plaintiff excepted.

Upon the point as to the statute, the facts are as follows: One Mrs. Sprinkle, whose intermarriage with her present husband took place in 1866, rendered personal services to the intestate in the years 1868, 1869, 1870 and 1871, at the rate of thirty dollars per year, and this constitutes the only debt due from the estate.

Thereupon the judge below ruled that the husband of Mrs. Sprinkle was entitled *jure mariti* to the proceeds of her services; that it was open to the defendant to set up the defence of the

statute of limitations, even admitting the conveyance to him to have been fraudulent; and that the debt for which the plaintiff sought to sell the land was barred by the statute, so far as the defendant was concerned. The plaintiff excepted.

The court refused to grant an order for the sale of the land, and the plaintiff appealed.

Messrs. Hinsdale & Devereux and *Argo & Wilder*, for plaintiff.
Messrs. Battle & Mordecai, for defendant.

RUFFIN, J. Unquestionably, it was the well settled principle, both of law and equity, as understood and enforced in this state prior to the adoption of the constitution of 1868, and the "marriage act" of 1871–'72, that the husband was entitled absolutely and in his own right to the services of the wife, and likewise to the fruits of her industry, whether exerted in his own affairs or in those of a stranger. He alone could receipt for, or discharge a debt arising from her services, or, if withheld, could sue for and recover it.

These rights were given to the husband, because of the obligation which the same law imposed upon him, to provide for her support and that of her offspring; and it would seem to be but just that they should continue unimpaired, so long as that obligation rests upon him.

The question as to the effect of the changes, which have been wrought in the law by the new constitution and the "marriage act" upon this right of the husband to the services and earnings of his wife, was incidentally considered in *Baker* v. *Jordan*, 73 N. C., 145, the late Chief-Justice delivering the opinion of the court. It was there said that the husband has still, notwithstanding those changes, the same right in this regard as under the common law: that the same obligation to support her rests upon him, and, in order that he may discharge it, the same right to her services is given to him.

There is certainly nothing, either in the constitution or the statute, which, in terms or by a necessary implication, secures to a married woman her separate earnings; and by nothing short of a plain expression of such an intention could this court be induced to give them that construction. If entitled, as a matter of right, to her own earnings, then she must be entitled to the time and opportunity necessary to make them, and, that is to say, that she may, at her own election, and without the consent of her husband, forsake her domestic duties and go out to labor for another for the purpose of acquiring earnings for her separate use. There can be no middle ground taken in the matter; for the one right, if admitted, necessarily draws to it the other, and we cannot suppose that those who framed the organic law or the statute intended to introduce any such anomalous conditions into the law regulating the relations of husband and wife in this state. Certainly there is nothing in the words used in either instrument to warrant such a supposition, and much less to force it upon the courts. Schouler, in his work on Domestic Relations (§ 162), says, that independently of the statutes, plainly securing to married women their separate earnings, the courts are always inclined to adhere to the common law rule upon the subject, and that they will not by implication deprive the husband of his right thereto, upon the strength of statutes which merely purport to secure to her her separate property, and for this he cites, in note 2, several authorities, to which we may add *Morgan* v. *Bolles*, 36 Conn., 175.

Doubtless a husband may consent that the fruit of his wife's toils shall be her own, and constitute her separate estate; but in such case her title will rest upon his consent and not upon the law; and the validity of the gift, as against his creditors, will depend upon the same rules which govern other conveyances from him to her. Nothing of the sort, however, is pretended to have been done in the present case, so as to take it out of the general rule, and the court, therefore, holds, as did His Honor below, that the debt created by the services rendered to the plaintiff's intestate

was due to the husband, individually, and that the same is barred by the statute of limitations, provided the defendant is in a condition to plead the same.

2. The right of the defendant to make this defence, conceding him to hold under a fraudulent conveyance from the plaintiff's intestate, does not seem to the court to admit of being questioned. It is true, that as against her creditors, his deed is declared void by the statute of frauds, and his possession is deemed by the law to be her possession, and, therefore, not adverse to them. Still, the first questions to be determined are, who are creditors? and what claims are valid? and in determining these, it surely cannot be contended that he occupies a worse position than his donor would do, or that he can be precluded from making any defence that would be open to her, were she now living and sued upon the claim. There is, in no sense, any privity between him and her administrator, by which the latter can claim to represent him, or to affect him by his admissions or acknowledgments.

In *Bevers* v. *Park*, *ante*, 456, we had occasion to consider the right of the heir under such circumstances to set up the statute of limitations as a defence, and governed by what seemed to be the great weight of authority, as well as by the justice and reasonableness of the proposition, we felt constrained to yield him that right. With infinitely greater force does the reasoning, which conducted as to that conclusion, apply to the case of a donee whose title, though void as to creditors, is still superior to that of the heir, or even of the ancestor himself, and certainly clothes him with every right that could possibly belong to either.

This court fully concurs in the rulings made in the court below, and the judgment thereof is affirmed.

No error. Affirmed.

A. J. HEADEN and others v. J. A. WOMACK and others.

Statute of Presumptions—Abandonment of Claim to Land—Evidence—Declarations of Grantor.

1. The statutory presumption of abandonment of an equitable claim to land, arising within ten years after the right of action accrues, is fatal to the plaintiffs upon the facts of this case. Rev. Code, ch. 65, § 19.
2. The declarations of a grantor, made at any time before a sale of land, are admissible against the grantee and those claiming under him; but otherwise, when they are made after the declarant has parted with the title and possession.

(*Ingram* v. *Smith*, 6 Ired. Eq., 97; *Hamlin* v. *Mebane*, 1 Jones' Eq., 18; *Hodges* v. *Council*, 86 N. C., 181; *Blake* v. *Lane*, 5 Jones Eq., 412; *Brown* v. *Becknall*, *Ib.*, 423; *Gray* v. *Harrison*, 2 Hay., 292; *Arnold* v. *Bell*, 1 Hay., 396; *Askew* v. *Reynolds*, 1 Dev. & Bat., 367, cited and approved).

CIVIL ACTION tried at Spring Term, 1882, of CHATHAM Superior Court, before *Graves, J.*

This action was begun on the 17th day of August, 1880, and the plaintiffs seek to enforce the specific execution of a contract for the purchase of land, entered into between their ancestor, Mrs. Margaret Headen, and George W. Goldston, under whom the defendant, Wiley, claims the land as a purchaser, the other defendants being his heirs-at-law.

The contract bears date the 10th day of December, 1850, and after reciting the fact that the said Goldston was the guardian of the children of the said Margaret, and had purchased the land for her at the price of one hundred dollars, and had also advanced to her a like sum to enable her to raise her children, it obliged him, in case these sums were allowed him in his final settlement with the children, so as to re-imburse him for the principal and interest of his outlay, to convey the said land to her in fee upon the coming of age of her youngest child.

On the trial, the evidence tended to show the following state of facts: Margaret Headen was in the possession of the land at

the date of the contract in 1850, and continued to occupy it until her death in June, 1862. Her children then occupied it until 1867, when they quit the possession, removing the house that stood upon it, and have never since resumed the possession. Her youngest child became of age in 1861, and soon thereafter intermarried with the plaintiff, James White. Upon her coming of age, her guardian attempted to settle with her, when her husband objected to her being charged with any portion of the sums advanced to her mother, but it was not shown how the settlement was made.

In April, 1862, Goldston sold and conveyed the land to the Sapona Iron Company, which immediately took possession of that part of the land not then occupied by Mrs. Headen and her family, and continued to hold it until 1869, when it was sold under an execution against the said company and purchased by the defendant, Wiley, who took possession of the whole and has continued to hold it ever since.

In 1862, the said Margaret, hearing that Goldston was about to sell the land, gave the contract which she held to one Brooks, and requested him to lay it before some attorney and take his advice with regard to it, which was done.

One Murdock, who was a member of the Sapona Iron Company, and who mainly conducted the negotiations for the purchase of the land with Goldston, denied that he, or the company, had any notice of Mrs. Headen's claim upon the land at that time, but that he heard of it afterwards, in 1874.

In charging the jury, after telling them that the possession of Mrs. Headen, at the time of the sale to the Sapona Iron Company, was in itself notice of her claim to the company, and that as the defendant, Wiley, was a purchaser at execution sale, he took subject to all equities, His Honor further instructed them, that if they believed the facts to be as above set out, then the law presumed an abandonment by the plaintiffs of their claim to the land, and they should therefore find for the defendants.

The plaintiffs excepted. Verdict and judgment for the defendants. Appeal by plaintiffs.

Mr. J. H. Headen, for plaintiffs.
Mr. John Manning, for defendants.

RUFFIN, J. Several very interesting questions were raised upon the trial of this cause in the court below, as well as in the argument of counsel at this bar, but it is not deemed necessary to advert to them, since the court considers the point, upon which the case was at last made to turn, as perfectly conclusive against the plaintiffs.

The statute enacts, that a presumption of abandonment of every equitable interest shall arise within ten years after the right of action thereon shall have accrued. Rev. Code, ch. 65, § 19. Its obvious policy, as said in *Ingram* v. *Smith*, 6 Ired. Eq., 97, is to insist peremptorily on diligence in all cases to which it has any application, and it is one which the courts must fairly carry out. So emphatically is it a statute of repose, that no saving is made in it of the rights of infants, *femes covert, or persons non compos*. *Hamlin* v. *Mebane*, 1 Jones' Eq., 18; *Hodges* v. *Council*, 86 N. C., 181. Like the presumption of payment arising upon a bond under the act of 1826, that of the abandonment of a claim may become, and does become, when the facts of the case are admitted, a conclusion of *law from facts*, to be applied by the court, and not left to the discretion of the jury. *Blake* v. *Lane*, 5 Jones' Eq., 412; *Cluggage* v. *Duncan*, 1 Sergt. and Rawle, 109. So, likewise, is it a question of law for the court, what circumstances, if true, are sufficient to repel the inference created by the lapse of time under the statute. *Brown* v. *Becknall*, 5 Jones' Eq., 423.

So far from there being anything in the case to repel or even to impair this statutory presumption of abandonment of their claim to the land, the very facts upon which the plaintiffs rely seem to the court to strengthen and sustain it, as being true in

fact. The contract which their mother made for the land was, at the outset, but a conditional one, and depended upon their ratification of it at the coming of age of the youngest child. When that event took place, or shortly thereafter, the parties are proved to be in a dispute about the matter, and it is not shown how they finally settled. They took the advice of counsel; submitted to a sale of the land to another; voluntarily surrendered the possession; taking care to remove the house they had erected thereon, and for full twelve years have taken no steps to assert their title or renew their claim. Such conduct cannot fail to satisfy every mind that what the law presumes, in fact took place, and that they then really abandoned their right; and very certainly that state of the facts warranted the instructions that were given to the jury.

We fully concur with His Honor also upon the point of evidence that arose in the case. The declarations of a grantor, made at any time before the sale, are admissible against his immediate grantee, and all who remotely claim under him. But all the cases agree, says 2 Phil. on Evidence, 655, that declarations made by the person under whom a party claims, after the declarant has departed with his right and the possession, are utterly inadmissible to affect any one claiming under him; and to this effect are the authorities in this court. *Gray* v. *Harrison*, 2 Hay., 292; *Arnold* v. *Bell*, 1 Hay., 396; *Askew* v. *Reynolds*, 1 Dev. and Bat., 367.

The court, therefore, sees no error in the judgment of the court below.

No error. Affirmed.

J. B. ELLIS, Adm'r, v. J. ADDERTON and others.

Judicial sale—Purchaser—Notice of defective title—Surety—Administrators.

1. Where a purchaser has notice of defects in the title to land sold (it being announced at the sale that only the intestate's interest was to be disposed of, and if he had no title the purchaser would get none), but executes notes for the sums bid; *Held*, the purchaser buys at his own risk, and is liable on his contract.
2. The surety upon the notes, in such case, who also had full knowledge of the fact, is also liable.
3. An administrator must apply, for license to sell land for assets, to the superior court of the county where the land or some part thereof is situated. Bat Rev., ch. 45, § 61.

(*Shields* v. *Allen*, 77 N. C., 375, distinguished and doubted.)

SPECIAL PROCEEDING commenced before the clerk and heard at Fall Term, 1882, of DAVIDSON Superior Court, before *Gudger, J.*

The plaintiff, administrator of Andrew Hunt, finding the indebtedness of the estate of the intestate very large, and the personal property in hand wholly inadequate to its discharge, filed his petition against the heirs-at-law for the sale of certain lands, consisting of five town lots and a tract of 186 acres, therein particularly described, and which, it is alleged, "were embraced in a deed of conveyance signed by Andrew Hunt, as the petitioner is advised, is void and invalid."

There was a decree of sale, and the plaintiff, acting under its authority, after due advertisement, on July 26th, 1873, exposed said lands at public sale, when one H. B. Dusenbury, since deceased, became the purchaser of each parcel at various sums as stated in the report, and gave several bonds therefor with John H. Peebles and E. D. Hampton sureties, payable as directed in the order.

The several sales were all confirmed and the plaintiff authorized and required on payment of the purchase money to make title to the purchaser.

The several notes, all under seal and given for the separate prices of the several parcels of land sold, not being met at maturity, notice was served upon the surety, Peebles, the present defendant, of an intended application to be made for judgment upon them against him before the probate judge. Such motion was made and an answer thereto put in on oath, in which it is alleged, on information and belief, that all the lands sold by the plaintiff had been conveyed by the intestate in his life-time, in trust to pay debts, and other sales had also been made under execution and for taxes, so that no estate or interest remained which could be disposed of under the decree, and no title conveyed in any of them.

The defendant, further insisting that no estate was acquired by the purchaser, demanded that he be exonerated from his liability on the notes, at least until the doubts clouding the title be removed, and the ability of the plaintiff to pass an estate in the lands under the decretal order be first made to appear; and further, in order to a full and final adjustment, that the heirs-at-law of the said H. B. Dusenbury be made a party in the proceeding.

The plaintiff thereupon files a verified replication in which, without a direct denial of the several conveyances, he avers that both the purchaser and his surety were present and heard his announcement previous to putting up the lands, that he only sold the interest, if any, that his intestate possessed, that no warranty would be given, that all the alleged defects in the title were fully understood and known, and that, on account of the previous sales and the doubts as to the title, the property did not bring one-fifth part of its real value with those doubts removed.

The cause was thereupon transferred to the civil issue docket for trial at term time, and an order of reference entered and issues prepared to be submitted to the jury.

The referee made his report to spring term, 1881, in which he

finds that the intestate did, on April 21st, 1876, convey by deed in trust to F. C. Robbins all the real estate mentioned in the petition and sold by the administrator, except the tract of 186 acres, therein designated as number 9, the legal title to which alone, was vested in the intestate at the time of his death.

The verdict of the jury upon the submitted issues affirms that both the purchaser, Dusenbury, and the present defendant, his surety, had notice of the defects in the title to the lands sold, that proclamation was made at the sale that only the intestate's interest was to be disposed of, and that if he had no title the purchaser would get no title.

The court thereupon proceeded, no exception to the report being taken, to confirm the same, gave judgment against the defendant upon the note for the price of the larger tract, and refused to give judgment against him upon the others, and adjudged that the defendant recover the costs of the issue.

From the latter rulings the plaintiff appeals.

Messrs. Scott & Caldwell and *M. H. Pinnix*, for plaintiff.
Mr. J. M. McCorkle, for defendant.

SMITH, C. J., after stating the above. It does not appear that the purchaser in his life-time desired to repudiate and be relieved of his contracts, upon the ground assigned by the defendant, and as the consideration of the notes enures alone to the benefit of himself and his heir or heirs, and the defendant is a surety, merely, with no other interest in the lands except their being looked to as a means of payment, his right to set up a defence open to the purchaser is not entirely free from doubt.

But waiving the point, as all the facts in reference to the antecedent conveyances and the consequent infirmity of title now relied on as a defence were well understood, as the jury find, by both the principal and surety before the lands were bid off by the former, and the notes for the sums bid, executed, and thus

all the hazards attending the purchase assumed, can they now ask to be relieved from the contract? The solution of this inquiry disposes of the appeal.

The administrator in such a proceeding represents primarily the creditor interest, and can only obtain license to sell real estate when it becomes necessary to pay the intestate's debts. He becomes thus clothed with a power of converting the land to the required extent into assets with which to discharge the liabilities of his intestate, and the sale in its general relations and effects differs but little from a sale under execution, made while the debtor is living, except that in the one case the money goes to the execution creditor, and in the other to a trustee representing them all to be distributed under the law.

The purchaser in either case may pursue and recover the property of the debtor, as could the creditor himself, and in respect to land may defeat the claim of a fraudulent alienee. So too, the administrator may sell an encumbered estate, or land to which there are contesting claims, leaving to the purchaser the controversy that may spring from the assertion of his right thereto. The statute allows him to sell "*all rights of entry and rights of action, and all other rights and interests,*" which the intestate may have possessed, or his creditors could have enforced against him. Bat. Rev., ch. 45, § 71.

The petition itself states that the real estate proposed to be sold is "*embraced in a deed of conveyance signed* (executed, we suppose to have been intended) *by Andrew Hunt, which, as your petitioner is advised, is void and invalid*"; the matter was fully understood, and the purchaser and his surety knew that only such title and interest as the intestate may have possessed, and none other, would be acquired; the purchaser has died without asking to be relieved; the land brings in consequence a fractional part of its value. Under these circumstances has the defendant any equity or right to be relieved of his obligation?

If it had turned out, in this purchase at hazard, that a good title had been obtained, the speculation would have been largely

profitable; if a bad one, ought he not equally to abide by his act?

There is no pretence or suggestion of fraud, imposition or mistake in the entire transaction, and if any adventurous purchaser can, with his eyes open, take advantage of his contract when remunerable, and be exonerated from it when it results otherwise, it would defeat sales of doubtful rights, and encourage speculation in bidders at them, who may make but cannot lose by the operation.

In *Shields* v. *Allen*, 77 N. C., 375, it is declared that when a commissioner acting under a judicial order sells the land and the purchaser acquires no title, he may have the contract rescinded, and any money he may have paid restored, because of his confidence in the results of a supposed judicial inquiry and determination; but that it is otherwise when the sale is of the estate of the persons named, and then the purchaser takes at his own risk.

Assuming the propriety of this nice distinction between a sale of *land* and an *estate* in the land in their legal consequences, questionable at least, the ruling in the case has reference to an innocent purchaser who bids for and buys the land under the impression that he thereby will acquire the title, a mistake into which he is led without the means of prompt correction. But it cannot be applicable to a case where the purchaser is in possession of full information of the facts, and is in express terms told that he will get only the interest of the intestate, and none, if the intestate has none in the land, and voluntarily, with this knowledge, bids, enters into the contract, and executes his several notes for the different sums of purchase money.

"In all sales made under supervision and control of the courts on decrees in equity, or on decrees made in the exercise of equity powers," is the conclusion reached by a recent writer, "there is no warranty; the purchaser takes what he gets." Rorer on Jud. Sales, § 458.

And again he says: "In the absence of misconception and of

fraud, the buyer must look out for himself. He buys at his own risk both *as to title and as to quality*. *Ibid*, § 462; *The Allegre*, 9 Wheat., 616.

The rule is more stringently laid down by BLAND, Chancellor, in *Brown* v. *Wallace*, 4 Gill and John. (Md.), 479, in these words: "The court in no case undertakes to sell anything more than the title of the parties to the suit, and consequently it allows of no inquiry into the title, at the instance of the purchaser or any one else." The rule, however, is different in England, and when lands are there decreed to be sold, the court, in most cases, undertakes to sell a good title, and it is common, therefore, to make a reference to the master to ascertain whether a good title can be made, and if not, the purchaser will not be compelled to comply with his bid.

But we can see no rule in force anywhere which permits parties, in the position of the deceased purchaser and the defendant, so to be relieved of the contract entered into under the circumstances of the present case.

The defendant further objects to the jurisdiction of the probate court of Davidson, and insists that as the intestate resided in Davie county and administration was granted in that county, the whole proceeding is *coram non judice*, and void. This was the former law (Rev. Code, ch. 46, § 5), but it is charged by the act of April 6th, 1869 (Bat. Rev., ch. 45, § 61), which directs the application for license to sell a deceased debtor's land to be made "in the superior court of the county where the land or some part thereof is situate."

While it is true the general provisions of the act are made applicable only to cases wherein original administration is granted after July 1st, 1869, yet the proviso to the section, limiting the operation of the law, declares that the limitation "shall not be construed to prevent its application so far as it relates to the courts having jurisdiction of any action or proceeding for the settlement of an administration, or to the practice and procedure therein. *Ibid*, § 58.

As the new courts are substituted for the former, the method of procedure prescribed must supersede that of the other, and the court taking cognizance, must be the same as to all administrations before as after that date. This objection must be overruled.

As the appeal is from a ruling upon a collateral matter, this will be certified for further proceeding in the court below according to the law declared in this opinion.

Error. Reversed.

GEORGE LYNN and others v. CANNADY LOWE, Adm'r, and others.

Judgment—Statute of Limitations—Motion in the Cause—Writs of error abolished.

1. A judgment rendered against a party after his death is irregular, where there was service of process and appearance, but no suggestion of the death; and the same will be set aside, in a direct proceeding for that purpose, so that the representative may have an opportunity to resist a recovery.
2. The statute of limitations in such case begins to run from the date of the appointment of the administrator, and the plea of the statute must be set up in the answer.
3. A motion in the pending cause to vacate an unsatisfied judgment, is the proper proceeding for the aggrieved party.
4. Writs of error are abolished, and section 296 of the Code, in reference to appeals, substituted.
5. The court does not pass upon the *bona fides* of the deed mentioned in the case.

(Mr. Justice RUFFIN dissenting).

(*Colson* v. *Wade*, 1 Mur., 43; *Burke* v. *Stokely*, 65 N. C., 569; *Aycock* v. *Harrison*, 71 N. C., 432; *Doyle* v. *Brown*, 72 N. C., 393; *Godley* v. *Taylor*, 3 Dev., 178; *Kahnweiler* v. *Anderson*, 78 N. C., 133; *Bacon* v. *Berry*, 85 N. C., 124, and case cited; *Long* v. *Cole*, 72 N. C., 20; *Askew* v. *Capehart*, 79 N. C., 17; *Kemp* v. *Kemp*, 85 N. C., 491, and cases cited, approved).

LYNN *v.* LOWE.

PETITION of defendants to vacate a judgment heard at June Term, 1882, of WAKE Superior Court, before *Bennett, J.*

The plaintiffs commenced their action by suing out process in the late superior court of Wake, returnable to spring term, 1868, against the defendant Cannady Lowe, as administrator of Hugh E. Lynn, principal, and Joseph Scott and others, sureties, on the guardian bond of the intestate, to recover the amount of the trust fund in his hands.

Upon the return of the writ, the defendants appeared by attorneys, whose names are entered in the cause on the docket.

The record shows that oyer of the bond sued on was craved and had, but not that any pleading or memorandum of such, under the practice then prevailing, accepted as an equivalent, was then or at any subsequent term filed or marked.

On May 3d, thereafter, and before the next term, Joseph Scott died intestate, of which event no notice was taken in the further prosecution of the cause, and no administration was taken on his estate until the issue of letters on February 16th, 1880, to Andrew Syme.

At spring term, 1869, of the present successor superior court, an order of reference was made to George M. Whiting to state an account of the administration of the trust estate, and George H. Snow afterwards, by consent, substituted in his place, as referee, returned his report to the following term.

At a special term held in December, thereafter, a *nol. pros.* was entered as to the defendant, Stephen Lowe, the report confirmed, and a jury verdict rendered assessing the damages and distributing the amount among the several relators, according to their several shares, at the sum of $5,937.22, and judgment accordingly entered against the defendants, Cannady Lowe and Joseph Scott, personally, as surety obligors, and against the former and others in their representative capacities, representing other deceased obligors, and for the costs of the action.

In February, 1879, the relators sued out a summons against the widow and others, heirs-at-law of Joseph Scott, all of whose

names were subsequently stricken out except that of his daughter, Margaret, who is left sole defendant in the action, and at spring term, 1879, filed their complaint setting out the former judgment and a series of partial payment thereon, and alleging that Joseph Scott in his life-time owned a tract of land therein described, and undertook to convey the same to the said Margaret with intent to defraud his creditors, and did execute a deed to her therefor, falsely reciting a valuable consideration as paid; that there are no personal assets of the intestate to be administered and requiring a personal representative; and demanding that the said deed be adjudged fraudulent and void, the residue of said judgment a lien thereon, and that the same be sold and the moneys arising therefrom applied towards the discharge.

The defendants, none of them, were aware of the recovery of the judgment against said Scott, until February 7th, 1879, when process in the last action was served on the defendant, Margaret, and a few days later she procured the issue of letters of administration to said Syme, and he and the other petitioners on the same day commenced the present proceedings, to have the judgment vacated and set aside, as to the intestate.

Upon the hearing, the motion of the plaintiffs to dismiss the petition for alleged informalities was denied, and that of the petitioners for a modification of the judgment refused, and from these rulings the parties respectively, against whom they are made, appeal to this court.

Messrs. Mason & Devereux and *Argo & Wilder*, for plaintiffs.
Messrs. Pace & Holding and *Strong & Smedes*, for defendants.

SMITH, C. J., after stating the facts. Passing by many of the objections raised by the appellees, plaintiffs, to the regularity and legal sufficiency of the method of procedure adopted for the reformation of the original judgment, and the exoneration of the intestate therefrom, mostly of a technical character and belonging to the old system of legal practice, we proceed to consider

those based upon the merits of the case, and against the granting of any relief in the premises.

It is insisted that the judgment ought not to be disturbed, after the lapse of so long a period of time since its rendition, and because it is not alleged or shown that there is any meritorious defence to the recovery, of the opportunity of setting up which the deceased debtor has been deprived.

There is a want of harmony in the adjudicated cases cited in Freeman on Judgments in the notes to sections 140 and 153, upon the void or voidable character of a judgment rendered upon an acquired jurisdiction over the person of the debtor, but after his death, whether ascertained and declared in the record or not, and whether it is an irregularity or error in law. But in *Colson's Ex'rs*, v. *Wade's Ex'rs*, 1 Murph., 43, in a short opinion, it is declared that the judgment "is erroneous and void in law," having been rendered after the death of the party. So the late Chief-Justice in *Burke* v. *Stokely*, 65 N. C., 569, says: "It was the business of the plaintiff to make this suggestion (the death of a defendant), as it is error in fact to take judgment against one who is dead." And later still, RODMAN, J., delivering the opinion in *Aycock* v. *Harriron*, 71 N. C., 432, uses these words: "When a party to an action dies after judgment, the action abates, just as it would by his death before judgment, unless it be revived by or against his personal representative, as was provided by Rev. Code, ch. 1, § 1."

In *Doyle* v. *Brown*, 72 N. C., 393, READE, J., declares that when a person has never been served with process, nor appeared in person or by attorney, a judgment against him is not simply voidable, but void; and it may be so treated whenever and wherever offered, without any direct proceeding to vacate it. The reason is that the want of process and the want of appearance are shown by the record itself whenever it is offered. It would be otherwise if the record showed service of process or appearance, when in fact there had been none. In such case, the

judgment would be apparently regular, and would be conclusive until by a direct proceeding for the purpose, it could be vacated."

This would seem to point out the propriety of the course pursued in the case before us, since, irrespective of the character of the judgment as irregular or erroneous and voidable only when so ascertained and declared, upon its face and in the disclosures of the record it is regular and valid, and can only be assailed and corrected by a direct proceeding. As life is presumed to continue in the absence of any suggestion to the contrary in the record, the defendant, it must be assumed, was living at the time of its rendition, and no evidence collaterally produced will be allowed to either party to controvert its verity. It was obviously the plaintiffs' duty to prevent an abatement of their action to bring the fact of the defendant's death to the notice of the court, and make the other necessary parties in consequence thereof, in order to proceed with the cause. It could not be the duty of any other, since the event that sealed the lips of the deceased recalled the authority of his attorney longer to represent him. The results of the failure to do this must fall upon him and them, who are in default, and he cannot complain that he loses the supposed fruits of his recovery.

But it is not required, in determining the controversy, to ascertain whether the judgment be void from the beginning, when the facts are adjudicated, or voidable only, and void from the time of such adjudication for future purposes, since, so far as the case discloses, no intervening rights resting upon such judgment have accrued to third persons, and to the present petitioners the same consequences follow in either case.

We put our decision upon ground common to both. It is the clear right of every person to be heard before any action is invoked and had before a judicial tribunal, affecting his rights of person or property. If no opportunity has been offered, and such prejudicial action has been taken, as well when he was never made a party as when by death he has ceased to be, in either case, the severance being equally effectual and absolute, the court will,

at once, when judicially informed of the error, correct it, and relieve him and his estate from the wrong, not because injustice is done in the particular case, but because it may have been done, and the inflexible maxim *audi alteram partem* will be maintained. In such case the court does not investigate the merits of the matter in dispute, but sets aside the judgment, and re-opens the otherwise concluded matter, to afford the representative the opportunity, not open to his intestate and which the law accords to all, of being heard in opposition.

Has this right been lost by delay, or is the remedy sought barred by the statute of limitations?

The plaintiffs insist that both obstructions are fatal to the proceeding, and we will now examine the force of these objections, as pointed out and urged in argument.

1. It is insisted that this being error in fact, or in the nature of a writ of error *coram nobis*, the action should have been brought within five years after the entry of judgment, as directed in Rev. Code, ch. 4, § 18. But this section is repealed by C. C. P., § 296, which abolishes writs of error, and substitutes a new system of appellate and supervisory jurisdiction for the correction of errors, as does the statute prescribing limitations in the Code displace those contained in the Revised Code.

2. If the case falls under section 37 of the Code, which provides for actions for relief not specified in the preceding limitations, and allows ten years in which to bring them, a period that had just expired when the application was presented, it is enough to say that the statute did not begin to run until there was a person *in esse* competent to begin the suit, that is, until the appointment of an administrator. This is a well recognized rule. *Murray* v. *The E. G. Co.*, 7 Eng. C. L. Rep., 66; *Godley* v. *Taylor*, 3 Dev., 178.

3. The defence can only be set up in an answer, and here it is simply one of the assigned reasons for the motion to dismiss. C. C. P., § 17. *Green* v. *N. C. R. R. Co.*, 73 N. C., 524; *Kahnweiller* v. *Anderson*, 78 N. C., 133; *Bacon* v. *Berry*, 85 N. C., 124.

4. The proceeding is, by motion, in a pending cause, since, until the judgment is satisfied, it is not considered as at an end. *Long* v. *Cole*, 72 N. C., 20; *Lord* v. *Beard*, 79 N. C., 5; *Askew* v. *Capehart*, 79 N. C., 17; *Kemp* v. *Kemp*, 85 N. C., 491.

5. The same answer may be made to the imputed laches of the petitioners. Besides, it is found as a fact that the existence of the judgment was unknown to all of them, until the summons in the last action was served, and soon afterwards steps were taken to correct the error in its rendition, and avert the consequences of its being allowed to remain.

It is again insisted that the conveyance of the land by the deceased was fraudulent, and the present movement is intended to protect it from liability to the recovered debt, and is not entitled to favor.

We do not enter into an inquiry as to the *bona fides* of the assailed deed, nor assume as a fact its fraudulent character. If it be such, it may be subjected to the intestate's debts as effectually upon a judgment hereafter recovered, since the liability upon the bond is unaffected by any limitation other than that raising a presumption of payment, and may be still asserted. But if it were otherwise, that cannot debar the administrator the right to contest the claim as to its validity, as well as amount; and the result of the proposed modification will only remove the conclusiveness of the adjudication, as a bar to the administrator, and allow him to be heard, when it is again sought to enforce the liability upon the bond.

This general review will dispose of other objections urged against the petitioner's demand for relief, which, with others appearing in the statement of the case, are, in our opinion, equally untenable.

There is error in the refusal of the court to disturb the judgment, and the appellants on the facts are entitled to have the judgment corrected.

This will be certified to the court below for further proceed-

ings in conformity with the law as declared in this opinion. The appellants will recover their costs.

RUFFIN, J., *dissenting.* The action was instituted, and the process regularly served upon all the defendants, including the intestate, Scott, returnable to spring term, 1868, of Wake superior court. At the return term an appearance was entered of record for all the defendants, and oyer of the cause of action craved and had, but no defences of any sort entered of record for them.

At spring term, 1869, a reference was made to ascertain the amount of the plaintiffs' demand, and upon the coming in of the report at the December term of that year, the same was confirmed, and judgment rendered against all the defendants of record, the intestate, Scott, having, however, in the meantime died, but no suggestion of his death being entered of record.

In 1879, Andrew Syme qualified as the administrator of the said Scott, and soon thereafter commenced proceedings to have the judgment set aside as to his intestate, purely upon the ground that it was taken after his death, and before the appointment of an administrator, but without venturing to deny the validity of the claim for which the judgment was rendered, or setting up any defence thereto.

Under these circumstances, the judge below did not deem it just to set aside the judgment, and therefore overruled the motion looking to that end, and in so doing I cannot concur with the majority of this court in thinking that he committed an error.

In reaching a conclusion upon the subject, I have felt controlled by what I conceive to be two important principles, but which my brethren seem to think not entitled to so much weight. The fact is, that a judgment taken against a deceased party upon whom there had been personal service of process and an appearance entered of record in his life-time, is not *void*, but simply erroneous, and to be corrected only upon a writ of error *coram nobis;* and the other is, that such a writ is never a matter of

right, but is granted or not at the sound discretion of the court, and never, unless the party make a show of merit in his application for it.

1. In Freeman on Judgments, § 140, it is expressly said that if jurisdiction be once obtained over the defendant in his life-time, a judgment rendered against him subsequently to his death is not void, but erroneous, and in section 153 the reason given for it is, that the court, having acquired jurisdiction over the party in his life-time, is thereby empowered to proceed with the action to final judgment, and while it ought to cease the exercise of its jurisdiction after the party dies, still its failure to do so amounts only to an error, to be corrected upon an appeal, in case the fact of the death appear of record, or by a writ of error *coram nobis*, if it have to be shown *aliunde*.

In *Warder* v. *Tainter*, 4 Watts, 270, the court say, that the authorities are abundant to show, that in no case is a judgment rendered by a court of competent jurisdiction considered void on account of the death of the defendant having occurred before its rendition, but after the service of process upon him; and that at most it is only avoidable and subject to be reversed upon a writ of error, but in no other way. And again, the same court say, in *Yaple* v. *Titus*, 41 Penn. St. Rep., 195, that the law is well settled that the death of a defendant does not take away the jurisdiction of the court after it has once attached, so as to render void a judgment subsequently given against him; that such a judgment is reversible only upon an appeal, or by a writ of error *coram nobis*.

In *Collins* v. *Mitchell*, 5 Florida, 364, and in *Coleman* v. *McAnulty*, 16 Mo., 173, exactly the same doctrine is held, that a judgment is not void because of the death of the defendant pending the suit, and before its rendition, but that it is erroneous, and can only be avoided in the manner that other judgments are gotten rid of that are erroneous in matter of law or fact.

These authorities I have referred to, not for the purpose of showing the origin of the principle upon which I rely, but to

show how generally it has been accepted by the courts, even in modern times. But the truth is, that the doctrine is a very old one, being clearly laid down in Tidd's Practice, 1136; Comyn's Digest, *Title Pleader* (3 B., 1); 2 Ld. Raymond, 1414; 2 Saunders' Rep., 101, and recognized in 3 Bacon Abridg., 294.

In Saunders, it is said that an assignment of errors is in the nature of a declaration, and is either of error in fact, or error in law. The former consists of matters of fact not appearing on the face of the record, which, if true, prove the judgment to have been erroneous; as, that the defendant died before verdict or judgment, &c., in which case the remedy is by writ of error *coram nobis.*

In *Arrowood* v. *Greenwood*, 5 Jones, 414, the late Chief Justice PEARSON concisely and sharply drew the distinction between such judgments as are void, such as are irregular, and such as are erroneous because of a fact not presented by the record, or of which the court had no knowledge, and he declares that the only mode by which a judgment of the last sort can be corrected is by writ of error for matter of fact.

2. A writ of error *coram nobis* is not a writ of right. In *Tyler* v. *Morris*, 4 Dev. & Bat., 487, a motion was made for such a writ for error in fact, in that the plaintiff was dead at the time the judgment was rendered, but as there was conflict in the testimony as to his being dead, the motion was denied and the defendant appealed. In delivering the opinion of the court and after referring to the English precedents, Judge DANIEL, without any apparent reservation, declared that a writ of error *coram nobis* is not a writ of right, but rests in the discretion of the court before which the application is made, and that before it could be allowed, there must be an affidavit of merits, setting forth some error in *fact*, by which, in case the fact assigned for error be true, the plaintiff's right of action would be destroyed.

In *Smith* v. *Kingsley*, 19 Wend., 620, the supreme court of New York say, that a writ for an error in fact is not a writ of right, and to warrant its allowance there must be an affidavit of

some such error in fact as will destroy the plaintiff's right to have judgment. And so it was laid down by DENISON, J., in *Ribout* v. *Wheeler*, Sayer's Rep., 166.

In *Winslow* v. *Anderson*, 3 Dev. & Bat., 9, an application for a writ of this nature was refused upon the ground that the judge below, as he conceived, had no power to grant it, and upon appeal to this court his judgment was for that reason reversed; but the court say, they wish it to be distinctly understood that if the court below had refused the writ in the exercise of its discretion, they would neither have had the inclination nor the authority to interfere with its action in the premises.

It is true, that in some of the cases there are to be found occasional expressions which seem to speak of judgments taken under the circumstances that this one was, as being absolutely void, and there are a few decisions, though none in this court, which look in the same direction. But the great weight of the authorities, whether we consider their number or the character of the courts from which they proceed, tends strongly the other way, and serves to convince my mind that the view which His Honor took of the matter was the correct one—that is to say, that the judgment is not void, and that though erroneous, inasmuch as it was rendered after the death of the defendant, yet the court will not, for that reason alone, vacate it, unless it be shown, or at least alleged, that it does injustice to some one. Why set it aside, however rendered, if it be for an honest debt, and for the true amount? and if not so, why didn't the administrator, who alone is presumed to know, so declare in his application?

I am far, however, from thinking that the plaintiffs should be permitted to enforce the collection of their judgment without giving the administrator, or the heir, an opportunity to show cause against it. To this end, I think, an issue in the nature of a *scire facias* should be directed to be tried as to the merits, if any plea they have; but in the meantime that the judgment

should stand, with its liens unimpaired, as a security for such amount as might ultimately be found to be due the plaintiffs. In this way and in this way alone, as it seems to me, can the full rights of all the parties be protected, without the least risk of doing injustice to any. But to my mind, it is a hard measure to mete out to the plaintiffs to strike their judgment from the docket as being void, after it has stood for so many years, and to put them to prove their claims anew, now that their witnesses may be dead, or their proofs lost.

Upon the point as to the statute of limitations, I fully concur in the views expressed by the Chief-Justice in his opinion, and also in holding that under our present system a party may have the benefit of a writ of error *coram nobis* upon a motion made in the cause, *Nelson* v. *Brown*, 2 Mo., 20. But as our statute (Rev. Code, ch. 4, § 20) expressly provides that every person who may bring a writ of error shall execute a bond with security to abide by and perform the judgment which may be finally given, I cannot understand how the parties who make this application can be excused therefrom.

PER CURIAM. Reversed.

E. J. LILLY and others v. B. R. TAYLOR and others.

Municipal Corporations—Repeal of Town Charter, effect of upon Creditors of the Town.

1. Municipal corporations are instrumentalities of the state for the administration of local government, and their powers may be enlarged, abridged, or withdrawn at the pleasure of the legislature, there being no contract or vested right involved.

2. The repeal of a town charter deprives its authorities of the power to levy taxes, or to collect taxes already levied, and puts an end to process for the enforcement thereof; but moneys collected and in hand may be controlled by the courts.

3. In such case, town property, such as public buildings, &c., is under the control of the state and not subject to town debts; nor can property of the individual citizen be so subjected except through taxation authorized by the legislature.

(*Wallace* v. *Trustees*, 84 N. C., 164, cited and approved).

MOTIN to dissolve an injunction heard at Fall Term, 1882, of CUMBERLAND Superior Court, before *Gilmer, J.*

The court ordered that the injunction theretofore granted by Judge Shipp, be continued to the hearing, and the defendants appealed.

Mr. George M. Rose, for plaintiffs.
Mr. R. P. Buxton, for defendants.

SMITH, C. J. Pursuant to several writs of *mandamus* issued from the superior court, at the instance of creditors who had recovered judgment on their several debts against the mayor and commissioners of the town of Fayetteville, who are defendants in this action, they levied certain taxes to pay the same and to meet the local expenses of the town government, and on September 29th, 1881, delivered the tax-lists containing the said levies to the defendant, Taylor, town constable and tax-collector, for collection. He was proceeding to make the moneys due thereunder until interrupted by the restraining order obtained by the plaintiffs, who are resident tax-payers in said town, charged as such in said list, and upon which the property of some of them has been seized by the collector. The mayor and commissioners resigned their respective offices previous to October 4th, 1881, to take effect on that day.

By an act passed at the session of the general assembly (Private Acts 1881, ch. 58), it is provided that in case the municipal authorities are unable to effect a compromise of the corporate indebtedness by reducing it one-half on or before September 1st, 1881, an election should be held on the first Monday of the ensuing month to take the sense of the qualified electors in the town

upon the question of a surrender of the charter, and if the response should be in the affirmative, a section (number 6), in the act and in these words should take effect: "All laws and parts of laws incorporating the town of Fayetteville and granting corporate powers to said town, are repealed."

The concluding clause in section 1 declares that the "town authorities shall pay the floating debt of said town, in full, before the provisions of this act allowing an abrogation of the charter shall be of force."

No compromise or reduction of the public debt being made, as authorized under the act, in consequence of the refusal of the creditors to accept the proffered terms, an election was held and the popular will ascertained to be in favor of the surrender of the charter and the extinction of the town as a municipal corporation, and the result was so declared and published by the sheriff of Cumberland, under whose direction the election was required to be held.

Upon the presentation of these undisputed facts, and others contained in the verified complaint of the plaintiffs, offered as an affidavit, His Honor granted a rule upon the defendants to show cause at Wadesboro, on a day fixed, why an injunction should not issue, as asked by the plaintiffs, against further proceedings in enforcement of the taxes levied, and in the meantime ordered the defendants to desist from making sale or interfering with the property levied on.

The defendants filed their answers, setting out the several writs of *mandamus*, in obedience to which the tax levies and lists were made out, and to meet also the necessities of local municipal administration, explaining some and denying other allegations in the complaint, and controverting the alleged effect of the repealing vote because of the non-payment of the floating debt, but not the facts which, in substance, we have extracted from the complaint. It is not deemed necessary to refer to the statements in the answers more in detail.

Several other plaintiffs have been associated, on their applica-

tion, with those who commenced the action and have similar interests, and three of those who are prosecuting these writs of *mandamus* have been admitted as co-defendants and adopt the answer of the defendant, Taylor.

After several postponements and upon the hearing of the plaintiffs' application and the answer to the rule, at fall term, 1882, of Cumberland superior court, the presiding judge continued the restraining order until the final hearing of the cause, and from this judgment the defendants appeal.

On the 8th day of March, 1883, during the week assigned for the hearing of appeals from the fourth judicial district, and after the first call of this cause, an act was passed, and went into operation, entitled "An act for the relief of the former town of Fayetteville, and for other purposes," the preamble whereof is in these words:

"Whereas, by virtue of chapter fifty-eight of the private laws of the general assembly of North Carolina, at the session of 1881, ratified March 12th, 1881, the charter of the town of Fayetteville, in Cumberland county, has been repealed and abrogated, leaving the creditors of said town without the means of collecting any part of their debts, and leaving the community without the necessary means of local government," &c.

The 44th section declares in more explicit terms that all laws creating any other offices for the local government of said district of Fayetteville, and all laws for the levying and collecting of taxes for the support and maintenance of any local government for said district, other than is herein prescribed, and all laws providing for the levying and collecting of taxes of any sort from the persons and property within said district, other than the state and county taxes, and the taxes by this act levied and directed to be collected, are hereby repealed and abrogated, and the offices created by said laws are hereby abolished, and it shall be unlawful for any person to exercise or attempt to exercise, the duties of any office so abolished.

The succeeding and last section but one enacts, that persons

offending against any of the provisions of this act, "shall be guilty of a misdemeanor and subject to punishment by a fine "not to exceed" the sum of $50, or "by imprisonment for 30 days."

Whatever doubt may have existed as to the consequences of the popular vote, in the absence of direct evidence of the full discharge of what is called the "floating debt," upon the continued existence of the town as a corporate body and the tenure of the offices created under its organic law, it is removed by the preamble and sections of the last act from which we have quoted, which act, emanating from the creative power, is equally efficacious as a repeal; and there is, therefore, no such town and no office to be exercised under the annulled charter. The legislature has formed, in its place, a new government denominated a tax-district, with full and minute directions for its management under persons specifically named and denominated "a board of commissioners."

The only question left open and which can now arise upon the appeal, relates to the validity of the legislation, which thus takes from the creditor all remedy for coercing the payment of his debt, under that provision of the federal constitution which prohibits a state from passing a "law impairing the obligation of contracts," Art. I, § 10, par. 1, and this inquiry is definitely met and answered by the supreme court of the United States in the decision of the controversy growing out of the repeal of the charter of the city of Memphis, and the effect upon creditors, in *Meriwether* v. *Garrett*, 102 U. S. Rep., 472.

The conclusions reached and announced after a careful and full examination by a unanimous court are:

1. Property held for public uses, such as public buildings, streets, squares, parks, promenades, wharves, landing places, fire engines, hose and hose-carriages, engine-houses, engineering instruments, and generally everything held for governmental purposes, cannot be subjected to the payment of the debts of the city. Its public character forbids such an appropriation. Upon the repeal of the charter of the city such property passed

under the immediate control of the state, the power, once delegated to the city in that behalf, having been withdrawn.

2. The private property of individuals, within the limits of the territory of the city, cannot be subjected to the payment of the debts of the city except through taxation. The doctrine of some of the states that such property can be reached directly on execution against the municipality, has not been generally accepted.

3. The power of taxation is legislative and cannot be exercised otherwise than under the authority of the legislature.

In a concurring opinion of Mr. Justice FIELD, to which Justices MILLER and BRADLEY give their approval, in explanation of the grounds of the ruling, he says:

"Municipal corporations are mere instrumentalities of the state for the more convenient administration of local government. Their powers are such as the legislature may confer, and these may be enlarged, abridged or entirely withdrawn at its pleasure. * * There is no contract between the state and the public that the charter of a city shall not at all times be subject to legislative control. All persons who deal with such bodies are conclusively presumed to act upon knowledge of the power of the legislature. There is no such thing as a vested right held by any individual in the grant of legislative power to them."

He then proceeds to say, that while public property such as court-houses, hospitals, fire engines, hose, and such articles as the corporation held for public use, cannot be reached and applied by creditors to their debts, nor can taxes levied but not collected at the dissolution of the corporation, be pursued and appropriated, even when levied under peremptory judicial orders; and that a repeal of the law put an end to the process for its enforcement; yet that *moneys collected* and in the hands of the officers "may be controlled by the process of the courts, and applied, by their direction, to the uses for which they were levied, but until then

there is nothing in existence but a law of the state imposing certain charges upon persons or property, which *the legislature may change, postpone or release*, at any time before they are enforced."

To the same effect is our own ruling in *Wallace* v. *Trustees*, 84 N. C., 164.

In the dissenting opinion of Mr. Justice STRONG, with whom agree Justices SWANE and HARLAN upon some of the rulings, it is said of the circuit courts of the United States that "they certainly have no power to compel the levy of a tax by a corporation that is without officers and which has ceased to exist."

It is manifest, then, that the defendant, Taylor, has been stripped of his official functions, as constable and tax-collector, by the extinction of the corporation and the withdrawal of the authority conferred by its charter, to levy or to collect taxes already levied, upon any of its officers or agents.

The case would not now be one for the exercise of the preventive power of the court, as the remedy at law is ample when sought in an action for damages, but as the tax-collector was acting under color of office, and where the efficacy of what had been done towards the surrender of the charter was somewhat uncertain, the restraining order was properly within the jurisdiction of the court in exerting its equitable powers.

The cause is not before us for a final disposition upon its merits, but only upon an interlocutory restraining order or injunction, and in this we declare there is no error. This will be certified.

No error. Affirmed.

LEWIS WEBB v. TOWN OF BEAUFORT.

Towns and Cities—Taxation.

Whenever the authorities of a town shall be commanded to levy and collect taxes to pay a judgment rendered against it, they may appoint a special tax-collector to collect the same. Act 1876–'77, ch. 257. But this power to appoint such a collector is additional, and does not abridge their right to require the collection to be made by the regular officer appointed for that purpose.

APPLICATON for *mandamus* heard at Spring Term, 1880, of CARTERET Superior Court, before *Avery, J.*

Defendant appealed.

Messrs. W. B. Rodman and *Strong & Smedes*, for plaintiff.
Messrs Simmons & Manly, for defendant.

SMITH, C. J. The plaintiff recovered judgment at February term, 1861, of the late county court of Carteret against the commissioners of the town of Beaufort, in the sum of $333.90, with interest on $300, principal money thereof from that date, and for costs. On application of the plaintiff a peremptory writ of *mandamus* issued on September 1st, 1879, commanding the commissioners "to levy taxes sufficient to pay, and to pay to the plaintiff or his attorney," the sum still due on said judgment, whereof a small sum had been raised by sale under execution of the market-house and two lots of land in said town, and for the costs incurred in the action.

The charter of the town, in force when the debt was contracted and judgment rendered, was repealed on March 2d, 1875, (Private Acts 1874–'75, ch. 33), and again the town was re-incorporated by the act of January 13th, 1877 (Act 1876–'77, ch. 43), "subject to all the provisions contained in the one hundred and eleventh chapter of Battle's Revisal of the laws of North

Carolina, and not inconsistent with the laws of this state and the United States, except so much of section sixteen as allows the commissioners of said town to determine the amount of their salaries and compensation, and also the salary and compensation of the mayor, and so much of section nineteen as allows the commissioners of said town to impose assessments of labor on citizens of the town, and sections thirty-six and thirty-seven."

The operation of the act was suspended on the result of a popular vote, upon its ratification or rejection, by the qualified electors, to ascertain which an election was directed to be held, and which, as we suppose, was in approval. It commits the government of the town to a board consisting of "a mayor and five commissioners."

In the return to the writ and in excuse for non-compliance with its directions, the defendants say, that in addition to the twenty-five cents levied upon every one hundred dollars in value of the real and personal estate, to be used only to defray the necessary expenses of local administration, they have levied thirty cents on the like valuation of real estate situate within the corporation, as authorized in section sixteen of chapter 111 of Battle's Revisal, and ninety cents on the taxable poll, for the purpose of discharging the judgments recovered by the plaintiff and by other creditors, who have caused similar coercive writs to issue against them, and this assessment is, in their opinion, as great as can be collected out of the people in a single year, without great and ruinous waste and sacrifice of property; that this special tax is in readiness to be put in a list for collection, and to be delivered to any officer authorized to enforce payment, but they have been unable to find any one competent, and who can give the required bond, for them to appoint to that office, after diligent efforts to do so.

The court deemed the facts stated in the answer no sufficient defence for disobeying the requirements of the mandate, and ordered a rule to be served on the defendants, returnable to the

next term, to show cause why an attachment should not issue against them for their disobedience, from which judgment they appeal.

We do not propose to pass upon the adequacy of the tax laid to meet the creditors' aggregate demands, nor do we understand them to complain that it is insufficient, or, if insufficient, that it is not as great as can be practically enforced and its fruits made available out of the property subject to taxation; but the dereliction in the duty imputed consists in the failure to complete the tax lists, containing the special tax, and placing it in the hands of their collecting officer.

The chapter in Battle's Revisal entitled "Towns," whose provisions, with some exceptions, are embodied in and constitute a portion of the present charter, confers authority upon the commissioners to appoint a town constable (§ 16) and he possesses power "to collect the taxes imposed by the commissioners, as sheriffs have to collect the taxes imposed by the county commissioners" (§ 24).

The defendants do not state that there is no town constable to perform the service of the collection, to whom the tax-lists could have been delivered, but seem to seek protection under the act of March 12th, 1877, which they interpret in the conferring of power upon a municipal corporation, required by a judgment of court to levy taxes for payment of debts, to appoint a special tax collector for that purpose, as exonerating all others, charged with collection of usual taxes, from this particular service. Act 1876–'77, ch. 257. But this is a misconstruction of the act and of its obvious import. The bestowal of this additional authority upon municipal taxing corporations does not abridge that already possessed by them. It only affords increased facilities for fulfilling the decretal orders of the court, without overtaxing the capability of existing collecting officers. The exoneration from such duties is confined to sheriffs or other collectors "of state and general county taxes" in the counties, other than those excepted by name, and extends to no other collecting officers (§ 3).

We have not considered the general subject of the town's liability as affected by the legislation which repeals the one charter and grants another, since it is not before us upon the appeal, and it is considered in the case of *Lilly* v. *Taylor*, determined at this term, *ante*, 489.

Our decision is that the tax lists should have been prepared and delivered to the town constable, or some sufficient reason assigned for not so doing. There is no error in the ruling on this point. Let this be certified.

No error. Affirmed.

W. JONES, surviving partner, &c., v. HARTFORD INSURANCE COMPANY.

Summons, service of upon agent of Corporation—Act of Assembly, repeal of.

1. The summons in an action against a foreign corporation may be served either upon a local or general agent. Act 1875, ch. 168, and Act 1877, ch. 157, construed.
2. The law does not favor a repeal, by implication, of a former act. Some notice of the former act must be taken, indicating an intention to repeal it; or there must be repugnance in the acts.

CIVIL ACTION tried at Fall Term, 1882, of ORANGE Superior Court, before *Shipp, J.*

The summons was served on James Southgate, an agent of the defendant company. The action is to recover the amount of a fire insurance policy.

The defendant company is a corporation duly organized under the laws of the state of Connecticut, and at the time of issuing the policy was doing business in the town of Durham, in this

state. J. W. Atkinson, of the city of Wilmington, was, and is the general agent of the company for the state, appointed under the provisions of the act of 1876–'77, ch. 157, § 3, and James Southgate its local agent at Durham, and the person through whose agency the policy in question was obtained.

The defendant contends that the summons should have been served upon Atkinson, the general agent, and not upon Southgate, the local agent, and on that ground moves to dismiss the action. The motion was overruled and the defendant appealed.

Mr. J. W. Graham, for plaintiff.
Mr. R. C. Strudwick, for defendant.

ASHE, J. Prior to the passage of the act of 1877, ch. 157, the service of the summons upon the local agent of a foreign corporation was unquestionably good.

The act of 1875, ch. 168, amendatory of paragraph one, section 82, chapter 17 of Battle's Revisal, provides, that if a suit be against a corporation, the summons may be served upon the president, or other head of the corporation, secretary, treasurer, cashier, director, or managing or local agent thereof; provided, "that any person receiving or collecting money within this state for or on behalf of any corporation of this or any other state or government, shall be deemed a local agent for the purpose of this section; but such service can be made in respect to such foreign corporation only when it has property within this state, or the cause of action arose therein, or when the plaintiff resides in the state, or when such service cannot be made within the state personally upon the president, treasurer or secretary thereof."

It is true this act is entitled "an act amendatory of the law concerning suits against railway corporations." But the title of an act is no part of the act, in a legal sense, and is never resorted to in the construction of statutes, except for the purpose of re-

moving ambiguities, and cannot be used to restrain or control the plain meaning of a statute. Potter's Dwarris on Statutes, pp. 103, 107.

The summons then may be served upon the local agent of a foreign corporation, when, as in this case, the cause of action arose in this state, unless the act of 1875 has been repealed. It is contended that it has been repealed by the act of 1877, ch. 157, which provides, in section 3, "that no insurance company, association or partnership, not incorporated by the laws of this state, shall directly or indirectly issue policies, take risks or transact business in this state, until it shall have appointed an agent residing in this state, who shall act in that capacity, until a successor be duly appointed, and upon whom any civil process *may be served*, and such service shall be binding and shall be personal service upon the company appointing him; a certificate of such appointment under the seal of the company shall be filed with the secretary of state, and copies certified by him shall be sufficient evidence." There is no repealing clause in this act, and there is nothing in its provisions to repeal the act of 1875, by implication; nor does the law favor a repeal by implication. A latter act is never construed to repeal a prior act, unless there be a contrariety or repugnance in them; or, at least, some notice taken of the former act, so as to indicate an intention in the law giver to repeat it. Potter's Dwarris, 156. There is no repugnance in these acts, and there is nothing in the act of 1877 which indicates an intention on the part of the legislature to repeal the act of 1875. The two acts are *in pari materia* and may well stand together, and must be construed together.

The conclusion is, that in actions against a foreign corporation, the summons may be served either upon a local or general agent.

We cannot suppose it was the intention of the legislature, in passing the act of 1877, to restrict any advantages our citizens possessed against foreign corporations. We have no doubt the provision of that act in regard to the appointment of a general

agent, upon whom process might be served, was adopted in view of the fact that foreign corporations sometimes did business in this state, without a resident agent, when there would be no one upon whom process could be served; and in such case, our citizens would be driven to a foreign forum for the redress of their grievances; or, that it might often occur, that it would be doubtful whether a person was the agent, or whether his agency had not been revoked before the commencement of the action. By the act of 1877, a person is designated upon whom process may be served with certainty, but a policy-holder may still, if he shall choose to take the risk that the person upon whom his summons is served is the local agent of the company, serve it upon him; and it will be as good as if served upon the general agent.

There is no error. Let this be certified, &c.

No error. Affirmed.

A. J. OWENS, Adm'r, v. RICHMOND & DANVILLE RAILROAD COMPANY.

Railroads—Negligence, burden of proof to show contributory, is not upon the company.

In an action by an engineer, in the service of a railroad company, for damages for injuries sustained by reason of the company's failure to keep its road-bed in order; *Held*, to be error in the court to instruct the jury that the burden of proof rested upon the defendant to show contributory negligence on the part of the plaintiff. The conflicting decisions upon this subject discussed.

(Mr. Justice RUFFIN dissenting).

OWENS *v.* R. R. Co.

CIVIL ACTION removed from Davie county and tried at Spring Term, 1882, of ROWAN Superior Court, before *Eure, J.*

The plaintiff, administrator of Mike O'Donnell, deceased, who was an engineer on defendant's road, sues the company to recover damages, alleging that the death of his intestate was caused by the defendant's negligence. Verdict and judgment for plaintiff, appeal by defendant.

Messrs. McCorkle & Kluttz, W. H. Bailey and *Charles L. Heitman,* for plaintiff.

Messrs. D. Schenck and *Watson & Glenn,* for defendant.

SMITH, C. J. The winter of 1880–'81 was unusual in its severity and changes of temperature, in consequence of which, by reason of successive freezings and thawings, a large mass of stone and dirt, forming the upper portion of a deep "cut" through which the railroad ran, becoming loosened, on the night of January 7, 1881, was precipitated on the track. The intestate of plaintiff, an engineer in the employment of defendant company, and as such in charge of the fast mail train then moving rapidly southward from Thomasville, its last stopping place, a little after the hour of eleven P. M., brought the train in sudden and violent contact with the unobserved obstruction, from the shock of which the intestate and the fireman were both instantly killed.

The night was dark; snow lying on the ground to the depth of three or four inches, but not on the slopes of the "cut"; and another train had passed over the place of the disaster safely, about a half hour before. The approach to the "cut" from Leonard's bridge is on a grade of fifty-two feet to the mile, and an ascending train can be brought to a stop in half the time required upon a level track. The head-lights of the engine, aided by that reflected by the sides of the "cut," project the light some one hundred yards in advance, at which distance an object of four feet in diameter would be rendered visible to one on the

watch for an obstruction, and, within this space and at this grade, a train of three cars moving at a speed of thirty miles an hour, by means of the air-brakes and reversing lever, could be arrested in running seventy-five yards, or, as others skilled in working engines thought, one hundred yards.

The train that met the disaster was nearly an hour behind schedule time when it left Greensboro, and the intestate and the conductor were both directed by the master of trains at that station not to make up lost time, and the conductor reminded the intestate of this order while wood was being taken in at Thomasville.

The rules of the company require a reduction of speed at Leonard's bridge to a rate of fifteen miles an hour. The conductor assigned to the train did not observe that the brakes were applied, or that there was any slackening up of the train at the bridge.

This is substantially the testimony of the witnesses, mostly the employees of the company, upon which rests the imputation of contributory negligence on the part of the intestate in bringing about the catastrophe in which he lost his own life. There was much evidence of the dangerous appearance of the overhanging rock and earth for a long time previous, and of the failure of the company to provide against the peril of its falling, but it is not necessary to set it out with particularity, since it was sufficient to enable the jury to find the fact of the defendant's negligence.

We propose to consider only one of the numerous exceptions appearing upon the record, and to which the brief summary of the testimony, bearing upon the intestate's conduct and management of the train at the time of collision, is pertinent.

The court, among other instructions, charged the jury: "If the jury believe that the defendant was guilty of negligence, then it devolves upon the defendant to satisfy the jury by a preponderance of evidence that the plaintiff's intestate was killed by his own negligence, or that he contributed to his death."

The decisions in the courts of England and the different states

are not in harmony upon the question, on which of the parties to an action for the recovery of damages, resulting from the negligence of the defendant, rests the burden of showing the absence or presence of negligence on the part of the plaintiff contributing thereto. "To make out a *prima facie* case," remarks a recent author in examining the doctrine of contributory negligence, "the plaintiff must not only show negligence on the part of the defendant, but he must also show that he was in the exercise of due care in respect to the occurrence from which the injury arose; and this is held in Maine, Massachusetts, Iowa, Illinois, Connecticutt, Mississippi, Michigan and Indiana; while in Pennsylvania, Missouri, Wisconsin, Kentucky, Maryland, Kansas, Alabama, Minnesota, New Jersey and California, it is held that the negligence of the plaintiff contributing to the injury complained of is a matter of defence, and that ordinarily the burden of proving it is on the defendant. In New York and several other states the decisions are irreconcilable." 2 Thompson on Negligence, 1176.

The class of cases which devolve this duty on the plaintiff assumes the cause of action to consist in an act or omission, involving not only negligence in the defendant, but the exercise of proper care by the injured party, both of which must co-exist and co-operate as essential ingredients, to entitle the latter to compensatory damages. The cause of action is complex, consisting in the union of both these constituent elements, contributing to the same injurious result. The principle is stated with force and clearness by Mr. Justice STRONG, of the court of appeals of New York, in *Button* v. *Hud. Riv. R. R. Co.*, 18 N. Y. Rep., 248, at a term held in 1858. The intestate had been run over and killed by a horse-car of the defendant, moving along West street, in the city of New York, at the hour of eleven in the night. "If the intestate was negligent, and his negligence concurred with that of the defendant," he observes, "the plaintiff had no cause of action. The reason why no right of action would exist is, that both the intestate and defendant's being guilty of negligence, they were the common authors of what immediately flowed from it, and it

was not a consequence of the negligence of either. The court cannot accurately and will not undertake to discriminate between them, as to the extent of the negligence of each. Neither, therefore, could allege against the other any wrong, and without a wrong there can be no legal injury. In this view, the exercise of due care by the intestate was an element of the cause of action. Without proof of it, it would not appear that the negligence of the defendant caused the injury."

There are many cases where the doctrine is maintained, that proof by the plaintiff of his own exercise of due care constitutes part of his case, and in its absence there can be no recovery. Thus, in *Lane* v. *Crombie*, 12 Pick., 177, where the plaintiff was run over by a sleigh; in *Dyer* v. *Talcott*, 16 Ill., 300, where the injury was produced by the plaintiff's running against a rope stretched over and concealed in the waters of Chicago river by the defendant; and in *Perkins* v. *R. R. Co.*, 29 Maine, 307; *Walker* v. *Herron*, 22 Texas, 55, and the large number of cases referred to in the notes to Wharton on Negligence, § 427; Sher. & Redf. Neg., § 43, note 2; 2 Thomp. Neg., 1085, 1176, 1177, notes 1-8.

On the other hand, the contrary is distinctly declared and the true rule said to be, that contributory negligence is wholly a matter of defence to be set up in the answer and proved on the trial. The cases of this import will be found in notes to the same works, Whar., § 428; Sher. & Redf., § 43, and authorities on either side collected in the addenda, pp. 12, 13; 2 Thomp., 1177. It is held in *R. R. Co.* v. *Gladmon*, 15 Wall., 401, where a small child of seven years was injured by a car; and in *R. R. Co.* v. *Horst*, 93 U. S. Rep., 291, where the injury was sustained by the party while traveling on a cattle-train of the company, the supreme court of the United States say that the *onus* of showing the plaintiff in fault rests upon the defendant, and will not be available as a defence unless established by a preponderance of the evidence.

In *Johnson* v. *R. R. Co.*, 6 Duer's Rep., 21, the plaintiff, in

avoiding a danger apprehended from another direction, came in contact with a passing car and was killed. The proofs left the matter in doubt as to the plaintiff's exercising proper care, and the court ruled that the evidence should have gone to the jury. To the same effect are *Thompson* v. *R. R. Co.*, 51 Mo., 190; *R. R. Co.* v. *Rowan*, 66 Penn. St. Rep., 393; *Hoyt* v. *City of Hudson*, 41 Wis., 105.

While we do not undertake to reconcile the divergent decisions in reference to the burden of proof, we think a clear deduction from them, and as well supported by sound reasoning, is, that if in disclosing the facts which constitute the defendant's negligence, it does not appear whether the plaintiff exhibited the necessary watchfulness and care to avoid the consequent harm or injury, it will be assumed there was no such want of it on his part; and if the plaintiff in any legal sense were the cause or the concurring cause of his own injury, the duty of so showing in self-exculpation devolves upon the defendant. The inference of this co-operating agency may be drawn from the plaintiff's proof of the defendant's neglect or misconduct, as well as by substantive and independent testimony produced by the defendant. "It is true," remarks Chief-Justice THOMPSON in *R. R. Co.* v. *Rowan*, *supra*, "if negligence appear by the plaintiff's own testimony, the defendant might rest upon it as securely as if proved by himself. As the love of life and the instincts of self-preservation are the highest motive for care in any reasoning being, they will stand for proof until the contrary appears."

But whatever may be the difficulty felt in an attempted reconciliation of the opinions entertained and expressed, or the laying down any rule of universal application on the subject, we think all the cases tend to the point, that when all the testimony is before the jury to establish a negligence in the plaintiff concurring with that of the defendant, and both contributing to the act from which the injury springs, it must be left to the jury to determine whether, upon the facts proved, the plaintiff has a legal cause of action against the defendant. The rule of lia-

bility has its modifications even when there is mutual negligence; for if the plaintiff was negligent, and the defendant, by the use of ordinary care, could have avoided doing the injury, he will, nevertheless, be subject to the action; and so, if the defendant was negligent, and the plaintiff, by the use of ordinary care, could have escaped the injury, the latter is not entitled to recover. Leading cases, illustrative of the two latter propositions, are *Davis* v. *Mann*, 10 M. & W., 545, where the defendant, with his horses and wagon, ran violently against the plaintiff's donkey, fettered and left by him negligently in the highway, when, by careful driving, the injury could have been averted; and *Butterfield* v. *Forester*, 11 East., 60, where the plaintiff rode violently against a pole put across the highway by the defendant, a free passage being left by another street in the same direction, and LORD ELLENBOROUGH declared that one party being in default will not dispense with another's using ordinary care for himself; for, he remarks, "two things must concur to support this action, an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff."

In the case before us, the blame ascribed to the company is not in the failure to remove the obstruction from the track during the brief space between the fall of the encumbered mass of earth and stone and the collision of the train with it, but more remotely in not examining the condition of the "cut" and removing the overhanging, menacing mass before its precipitation, and thus averting the danger and the disaster. But the direct and immediate cause of the intestate's death was his own action in impelling the train upon the obstruction, and his own exercise of vigilance, or want of proper care and attention, under the circumstances and at such a time, were connected with and were essential qualifications of that action, upon which the right to recover depended. The presence of one or the other gives character to the act, and, indeed, constitutes a material part of it. To the solution of this inquiry, the attention of the jury must be directed. And the distinction seems to be marked

between those cases where the defendant's negligence is the remote, though it be an efficient, cause of the injury sustained by the plaintiff, and those in which the plaintiff's carelessness precedes, and that of the defendant is the direct, immediate and active cause producing the injury. In the former, the defendant's misconduct may be the primary, but that of the plaintiff, the direct cause, and it is difficult to see how, in examining into the plaintiff's agency, you can separate the character of the act, as involving care or blame, from the act itself, as a matter for the jury to consider and pass upon.

In *Oldfield* v. *R. R. Co.*, 14 N. Y., 310, WRIGHT, J., says: "The circumstances under which the death occurred, as detailed by the witnesses, were not conclusive in law that the injury was occasioned by the fault of the child, or that such fault contributed to produce it. The question of the *negligence of the parties* was one, under the proofs when the plaintiff rested, *eminently for the consideration of the jury.*"

In the case cited from 66 Penn. St. Rep., the Chief-Justice remarks, that "if negligence appears by the plaintiff's own testimony, the defendant might rest on it as securely as if proved by himself."

So, in *Robeson* v. *Gary*, 28 Ohio St. Rep., 241, DAY, J., speaking for the court, says; "It is only when the injury is shown by the plaintiff, and there is nothing that implies that his own negligence contributed to it, that the burden of proving contributory negligence can properly be said to be cast on the defendant; for when the plaintiff's own case raises the suspicion that *his own negligence contributed to the injury*, the presumption of the care on his part is so far removed that he cannot properly be *relieved from disproving his own contributory negligence by casting the burden of proving it on the defendant* * * *. The question should be left upon the whole evidence to the determination of the jury, with the *instruction that the plaintiff cannot recover, if his own negligence contributed to the injury.*"

Again, in *O'Brien* v. *McGlinchy*, 68 Maine, 552, decided in 1878, PETERS, J., after stating the proposition that if the injured party fails to take proper precaution and care, this will not exonerate the defendant from the duty of using reasonable diligence to prevent the injury, proceeds: "But this principle would not govern when both parties are contemporaneously and actively in fault, and by their mutual carelessness an injury ensues to one or both of them; nor when the negligent act of the defendant *takes place first, and the negligence of the plaintiff operates as an intervening cause between it and the injury.*"

So in *Hoyt* v. *Hudson*, *supra*, LYON, J., after placing the burden on the defendant of proving facts which go to defeat the action in cases generally, goes on to say: "The rule here adopted does not apply to a case in which the proofs on the part of the plaintiff show, or tend to show, contributory negligence. If such negligence conclusively appears, the court will nonsuit the plaintiff, or direct the jury to find for the defendant. If the evidence only tends to show such contributory negligence, the question must go the jury, to be determined like any other question of fact, upon a preponderance of the evidence."

In *R. R. Co.* v. *Gladmon*, *supra*, after laying down the rule, as quoted, HUNT, J., observes, "that generally, as here, the proof which shows the defendant's negligence shows also the negligence or the caution of the plaintiff. The question of the burden of proof is therefore not usually presented with prominence."

As the deceased, upon the evidence, while in charge of the train as engineer, ran it with great violence upon the obstructing fallen rubbish and lost his life by the collision, the inquiry before the jury was material in supporting the action, whether he was then in the exercise of that care and attention demanded by the circumstances for his own safety and that of the train and others upon it, and these would seem to be inseparable from his acts since, if they were wanting, the disastrous result must be attrib-

uted, not to any omitted duty on the part of the company, but to his own neglect. This inquiry, we think, unaffected by presumptions that might be raised in the absence of evidence, ought to have been submitted to the jury and determined on the weight of the evidence, as proving or disproving the intestate's own negligence and want of care.

The error committed by His Honor consists in separating a part of the facts entering into and constituting the transaction, and drawing an inference from them, as if they were the entire transaction (admissible upon the authorities if this were true), and requiring this inference to be overcome in weighing the other facts, instead of submitting the whole evidence with directions to the jury as to the law in the one or the other aspect of their finding. We see no just grounds for dislocating so much of the evidence as tends to charge the intestate with official and personal neglect from that proving neglect in the defendant, so that the former, fortified by the attaching presumption, goes over to the jury and is made to possess a force denied to the latter in determining the general result. In law, it is just as necessary that the plaintiff be free from fault, without which the catastrophe could not have taken place, as that the defendants's neglect of duty should have been an efficient agency in causing it. Both must co-exist as concurrent forces to exempt from liability, and the exercise of due care or the want of due care, in either, must alike be found by the jury upon the proofs in the case.

The whole controversy turns upon the point, whether the intestate on the occasion was vigilant and on the look-out, as one in his position should be, for possible dangers, or was recklessly rushing on with his train, regardless of what might happen to it, so that he failed to observe the peril in time to resort to the means of arresting its progress or diminishing its speed. If he was remiss and neglectful in this regard, his death was caused by his own act, and his administrator cannot recover. If, on the contrary, he was watchful and used due care, and the collision could not have been prevented by the use of such appli-

ances as were at his command, then the defendant's neglect found by the jury would render it chargeable with the consequences directly flowing from such neglect.

The question was simply as to the character or quality of the intestate's own act, as determined by the attending circumstances; and as there is no presumption, when all the facts are disclosed, that proper care was used, so there is none that it was wanting; and the transaction should have been committed to the jury to find how the fact was.

It was not proper to burden the defence with the removal of the presumption thus raised for the plaintiff, and put it in the scale with the evidence on one side of the proposition to outweigh that adduced on the other. The inquiry should have been free from that embarrassment, and simply left to the jury to solve upon the evidence heard.

We reach this conclusion upon a survey of the whole subject, and in the light of judicial opinion, as a just and fair rule to be observed in such contentions, and we think that whenever the issue depends upon the character of the plaintiff's own conduct, it being the immediate cause of the injury, and there is evidence to warrant the finding, the jury should be left free to determine the essential fact on which the defendant's liability depends. This was not done in the present case, but an inappropriate rule applied, to the predjudice of the defendant, which entitles it to a trial before another jury.

We purposely refrain from expressing an opinion upon the other points, inasmuch as the error pointed out is decisive of the appeal.

The verdict must be set aside and a *venire de novo* awarded, and it is so ordered. Let this be certified.

RUFFIN, J., *dissenting*. I am unable to concur in the view which a majority of the court take of this case, and especially in the reasoning upon which they rest their decision. Even if I understood the facts as they do, I do not think I could assent

to their conclusion; but with an understanding of them so wholly at variance with theirs, it is impossible that I could ever do so.

In his complaint, the plaintiff alleges that his intestate, Mike O'Donnell, was in the employment of the defendant, as an engineer, upon one of its locomotive engines run upon its railroad; that it was the duty of the defendant to provide a safe road-bed for its trains to pass over, but that instead of doing so, it so negligently maintained its road-bed, at a certain place situate near Lexington in Davidson county, known as the "Caldwell cut," that on the night of the 7th of January, 1881, a large mass of rock and earth was permitted to fall from the sides of the "cut" upon the track of defendant's road, whereby the engine driven by said intestate was thrown from the track, and by reason of the concussion so produced, he was thrown from his proper position upon the engine, and instantly killed.

In support of these allegations, the plaintiff introduced a number of witnesses who testified as to the dangerous condition of the "cut" in question, extending through many years; that it was from thirty to forty feet deep, and so constructed that large rocks were left projecting over the road-bed, so that if they fell, they must needs fall upon the track, and were of such a size that they would extend across the entire track; that the rocks were filled with seams and powder cracks produced by blasting, through which the water percolated, and, by freezing, served to dislodge them from the sides of the "cut," and to precipitate them upon the track; that on several occasions, prior to the disaster resulting in intestate's death, large masses of rubbish, consisting of several tons of rock and earth and sufficient to produce fatal consequences, had fallen, from the effects of time and the weather, upon the track at this point; that on the night in question a similar slide took place, whereby a complete obstruction was thrown upon the track, and amongst other things a large rock five feet in length and three feet in thickness, which lay directly across the track and which chiefly caused the disaster; that the day after the accident the defendant caused to be re-

moved from the sides of the "cut" five or six car-loads of loose stone and earth, which were in a condition to be precipitated upon the road-bed; that the night was dark, and it had been snowing, and there were some three or four inches of snow on the ground, though none on the sides of the "cut."

It was also in evidence that the winter of 1880–'81 was an extremely cold one, and for three weeks prior to the 7th of January, the cold and freezing had been unusually intense.

I have been thus particular in setting out the substance of the plaintiff's testimony in chief, in order that it may be seen that it establishes a clear *prima facie* case of gross negligence on the part of the defendant, and that there is nowhere to be seen in it even the faintest suggestion of any contributory negligence on the part of the intestate.

In its answer, the defendant denies that either it or its agents or employees had been guilty of any negligence or carelessness about the matters complained of, and says that it is informed and believes that the plaintiff's intestate came to his death by reason of his own neglect and carelessness.

In support of this latter branch of its defence, testimony was offered going to show that another train had safely passed through the "Caldwell cut" about one-half hour before the disaster befell the train upon which the intestate was; that the winter was one of extreme and unusual severity, such as the defendant had no right to anticipate and was not bound to provide against; that the approach from Leonard's bridge to the "cut" was at a grade of fifty-two feet to the mile, and an ascending train could, with the aid of such appliances as were in use at the time, be stopped in half the time requisite upon a level; that the head-light, which was in good condition, threw the light ahead, so that an object four feet in size could be seen at the distance of one hundred and fifty or two hundred yards, by one properly watchful; that the regular schedule time for the train, to which the accident happened, was thirty miles an hour, and at that rate and up such a grade the train might be brought to a stop within

seventy-five or a hundred yards; the train that night was nearly an hour behind time upon leaving Greensboro, where the conductor and the intestate, both, received instructions not to undertake to make up any part of the lost time, but to confine themselves strictly to the schedule time; that instead of doing so, the intestate drove his engine at the rate of fifty or sixty miles an hour, and though he was required by the regulations of the defendant company to slacken his speed when crossing the bridge at Leonard's creek, he omitted to do so on this occasion. To show the rate at which the train had been driven by the intestate, the defendant introduced its conductor (in charge of the wrecked train), who testified that when the train stopped at Thomasville, which was the last stopping place before reaching the point of the disaster, he reminded the intestate of their instructions not to exceed the regular time; that the distance between Thomasville and the "cut" is nine and a half miles, and they left the former place exactly at four minutes before eleven o'clock, and the disaster occurred exactly at eight minutes after that hour, thus showing that the train had been driven at the rate of some forty-five or fifty miles per hour.

In order to rebut this show of negligence on the part of his intestate, the plaintiff offered testimony going to show that the train in question did not stop at Thomasville at all that night, but passed without stopping. He also offered testimony of a skilled engineer to the effect that an object, even so large as a cow, could not be distinguished by the aid of the head-light at a greater distance than fifty or sixty yards, and that going up such a grade as the one in question, owing to the necessity of keeping the fireman's door open and the glare thereby produced, the engineer could not see ahead at all.

In this state of the proofs, the court, at the request of the plaintiff, instructed the jury that if they believed that the defendant was guilty of negligence, then it devolved upon it to satisfy

them by a preponderance of evidence that the plaintiff's intestate was killed by his own negligence, or that he contributed to his death.

The jury were further instructed, that the burden of proving the defendant's negligence devolved upon the plaintiff, and if the injury could have been avoided by the exercise of ordinary and reasonable care on the part of the intestate and he failed to use such care, it would make him guilty of contributory negligence, and the plaintiff could not recover; that it was for them to determine upon the evidence what his conduct was: was he running his train, in violation of orders and the rules of the company, at an increased speed? or could he have seen by his head-light the mass of rock and earth upon the track in time to stop the train? if he could, it was his duty to do so; and if he neglected any other duty, his failure would be contributory negligence in him; and if the evidence, by a preponderance, satisfied them that such was the case, they should find the issues in favor of the defendant.

Taking the charge as a whole, I see no error in it. Indeed, as it seems to me, if His Honor had had before him, and taken as his guide, the opinion of the Chief-Justice filed in this cause, he could not, more nearly than he did, have presented the course of instruction to the jury, which my brethren say he should have done. In effect, the jury were told to consider the whole evidence and say whether the intestate had, in any way, through his own negligence, contributed to his own injury, but, that if in the conflict of the testimony upon the point they were unable to say with certainty how that was, then, as it was a matter of defence and the burden rested upon the defendant, they should find the issue for the plaintiff.

That there was a conflict in the evidence bearing upon the point, calling for the exercise of a discretion on the part of the jury in passing upon the credibility of the witnesses and the probability of their statements, appears unmistakable to my mind; and yet, if I understand the opinion of the court cor-

rectly, it proceeds upon the ground that the facts of the case were all certainly ascertained and unquestioned before the jury.

It is strange it should be so, yet no question seems so much involved in uncertainty, growing out of the conflicting decisions with regard to it, as that which has reference to the burden of proof in respect to the plaintiff's freedom from negligence, in a case such as this—some of the authorities holding that it devolves upon him to allege and affirmatively establish that he was free from negligence contributing to his injury, while others hold that his negligence is a matter of defence, the burden of proving which rests upon the defendant. In this court, until now, it has been an open question; but to my mind it seemed so reasonable and logical that the *onus probandi,* in such a case, should rest upon the defendant, that I could but hope the court would, whenever the opportunity offered, adopt that view, and not leave it to be any longer a disputed point with us.

The opposite rule strikes me, not only as being illogical and contrary to the rules of good pleading, in that, it requires the plaintiff to aver and prove negative matters, but as losing sight of that reasonable presumption, which the common law always makes, that every person does his duty until the contrary is shown. It is, moreover, in opposition to the very law of our nature, and makes no allowance for that instinct which prompts men, when in hazardous situations, to use care in avoiding injury and preserving their lives.

Two out of the three commentators referred to in the opinion of the Chief-Justice do not hesitate to declare their dissent to such a rule. In Wharton, § 425, after referring to the question as being unsettled by reason of the conflicting decisions upon it, the author remarks that it should be remembered, that as a person is presumed to be careful until the contrary appear, the plaintiff, after having shown the defendant's negligence, *ought to be entitled to rest on this presumption.* In Sher. & Redf., § 44, in discussing what should be the true rule in such cases, the authors say, their opinion agrees with that expressed by DUER,

J., in *Jackson* v. *Hudson River*, &c., 5 Duer, 21, where that able jurist held negligence on the part of the plaintiff to be a matter of defence, to be affirmatively proved by the defendant, though it might of course be inferred from the circumstances proved by the plaintiff.

When the plaintiff in this case closed his evidence, he had a perfect *prima facie* case to go to the jury with. He had given evidence of the defendant's neglect, and no contributory negligence of the deceased appeared. The logical consequence of such a condition of things was, that the defendant as a wrong-doer should be required to make compensation to the party injured, and if it sought to relieve itself of that obligation by the fact that the deceased had contributed to the injury, it was incumbent on it, as it seems to me, upon every principle of right reasoning and good pleading, to establish that fact by at least a preponderance of testimony; and when after this, the evidence upon the point became contradictory and conflicting, and was left to go to the jury in that condition, I can but think that His Honor did right in reminding the jury that the laboring oar was upon the defendant, whose duty it was to make the matter plain. To do so, was to do nothing more than to tell them that they might make use of, as elements of evidence, that presumption of right conduct which the law always makes, and those instincts which prompt men in their sober senses to self-preservation; and it imposed upon the defendant just that labor in establishing its defence that it did upon the plaintiff in proving the defendant's negligence in the first instance.

PER CURIAM. *Venire de novo.*

CHERAW & SALISBURY RAILROAD COMPANY v. COMMISSIONERS OF ANSON.

Railroads—Corporations—Taxation.

1. Variations in a route over which a railroad may run, do not affect the identity of a corporate body that builds it, where subsequent acts are amendatory of the original charter and give permission for a deflection from the line first projected; and the right to exemption of property from tax granted in the original charter, is retained unimpaired.
2. Where a new corporation is formed out of two existing corporations, these latter ceasing thereafter to exist, the law forming the new corporation governs and controls its corporate functions and rights.

(*R. R. Co.* v. *Reid*, 13 Wall., 264; *R. R. Co.* v. *Com'rs*, 87 N. C., 129, cited and approved).

MOTION for injunction heard at Spring Term, 1882, of ANSON Superior Court, before *Shipp, J.*

Motion refused and plaintiff appealed.

Mr. James A. Lockhart, for plaintiff.

Messrs. Burwell & Walker and *Little & Parsons*, for defendants.

SMITH, C. J. On the 2d day of February, 1857, the general assembly passed an act incorporating a company by the name of "The Coal Fields and South Carolina Railroad Company," as designated in one section, and in another, "The Cheraw and Coal Fields Railroad," having for its object the construction of a line of railroad connecting with some one of those then built, or in course of building, in that state, and passing by Carthage, terminating at the coal fields, on Deep river, in Chatham county. Its capital stock was fixed at two million dollars, and the company, when formed and organized, was invested with all the powers necessary to the successful prosecution of the enterprise.

Section 20 enacts "that the franchise hereby granted shall vest

in, belong to, and be enjoyed by said company and their successors for the period of ninety-nine years, and the profits thereof shall be divided among the stockholders in proportion to the stock by them respectively held, during which time the stock of said company and the real estate of said company, which may be purchased by them, and connected with, and subservient to their works hereby authorized, shall be exempt from taxation; provided that nothing herein contained shall be so construed as to deprive the general assembly for this state of the right of imposing taxes of dividends and profits, according to the stock of said company, whenever, in their discretion, it may be necessary or expedient; provided, further, that the tax which may be levied on the same shall not be greater than that levied on similar property of this state."

Section 30 provides for the annual payment to the state treasurer, after the road shall be put in operation, of a *bonus* (as it is called) of twenty cents per ton for the freight transported, and the same sum for each passenger carried over the road, with a proviso "that nothing herein contained shall be so construed as to prevent any future legislature from imposing an additional tax on freight and passengers; provided, further, that no tax shall be imposed upon said railroad, other than that imposed by this charter, greater than that imposed upon the other railroads in North Carolina, which shall reduce the net profits of said railroad below six per cent. per annum."

Concurring legislation was adopted in South Carolina, for the construction of so much of the proposed road as lay within the limits of that state, in December of the same year.

On September 13th, 1861, was passed an act professing in its title "to revive and continue in force an act entitled 'An act to incorporate the Cheraw and Coal Fields Railroad Company,'" referring by description and date to the original charter, and making some modifications in its terms. These modifications are, in substance, a reduction of the capital stock from two millions to two hundred thousand dollars; a change in the route so far as

to require that it pass within ten miles of instead of by Carthage; an authority given the directors to call for installments of ten instead of one per centum on the subscriptions; forbidding any discrimination against the railroads of this state on freight or passengers, and requiring charges for freight to be the same, agreeably to distances each way; fixing the gauge of the road at 4 feet 8½ inches, so as to correspond with the gauge of the North Carolina railroad, compelling the road to cross the track of the Wilmington, Charlotte and Rutherford railroad at a point not west of the town of Rockingham; declaring its name to be the Cheraw and Coal Fields railroad company; and repeating sections 28 and 30 of the act amended.

On December 21st, of the same year, was passed another amendatory act, with the declared purpose in its title to amend the act of incorporation, referring to it by name and date of ratification, the first section of which substitutes two other commissioners in place of two who are superseded, and the second provides: That the company chartered by said act, when organized, and the president and directors thereof shall, in addition to the powers, rights and privileges granted by said act, have all the powers, rights and privileges, and be subject to the same liabilities, except as otherwise provided for, as are conferred and imposed by the amendments to the charter of the Cheraw and Coal Fields railroad company by an act entitled, &c., referring to that which revives and continues in force the incorporating act.

On May 10th, 1862, an ordinance passed by the state convention, then sitting, repeals the section of the charter (9) which confers the power and directs the mode of proceedings to have condemned lands necessary for the use of the road, when they cannot be purchased of the owner for want of agreement as to the price—adding a proviso, that the road may cross the Wilmington, Charlotte and Rutherford railroad within twelve miles west of Rockingham; that as much money may be spent and as much work done in the building of the road north as

south of that intersected track; and requiring the road to be completed to the Coal Fields within five years after the close of the pending civil war.

On February 1st, 1867, the company designated by its proper corporate name was authorized to receive, in payment of subscriptions to its stock, lands, bonds, stocks or other securities on terms and at rates to be agreed on between the parties.

At a later period in the same month, power was given by the general assembly to the counties along the proposed route of the road, or in its vicinity, to subscribe for shares of stock not exceeding two thousand shares to each, when approved by a popular vote, with provisions for holding an election for that purpose, and prescribing how the bonds in payment of subscriptions shall be issued and secured by the levy of taxes, to meet the payment of principal and interest.

Again, on December 16th, 1868, was ratified "An act to amend the charter of the Cheraw and Coal Fields railroad company," repealing the proviso in the ordinance, and giving five more years to the company to finish the road to the crossing already referred to, and five more years to make the extension which it authorizes.

This act authorizes, and amends the charter of the company for that end, the continued construction of the road from a point on the South Carolina line, to be selected by the company, "to a point on the line of the Wilmington, Charlotte and Rutherford railroad, at or near Wadesboro, with the privilege of extending the same across the track of the said Wilmington, Charlotte and Rutherford railroad to such point on the North Carolina railroad, at or near Salisbury, as may be selected by the said company;" changes the name of the company to that of the "Cheraw and Salisbury railroad company, and forbids a discrimination in tariffs in favor of either North or South Carolina railroads crossing or connecting with this road.

Under such friendly and fostering legislation, means have been contributed and expended in the building of the road as

far as Wadesboro, between which and the starting terminal point, trains have been and are still running, but the company's resources have been insufficient to extend the construction further.

It is manifest, and indeed not contested in the argument for the defendant (the sheriff of Anson), that the taxes which he is proceeding to collect, and to restrain him from doing which the interlocutory order of injunction asked for was denied, are repugnant to the terms of the contract of exemption contained in section 30 of the charter, and that the company is entitled to relief, if the protection and privilege therein secured are available to it in its present organization.

But the defendant contends that the changes produced by subsequent legislation are so fundamental as to have destroyed the identity of the corporation, as first formed, and substituted a new corporate organization in its place, to which the exemption has not been transferred.

In order to a satisfactory solution of the question, thus presented, we have examined the series of acts of the general assembly relating to the company, and recited the substantial provisions contained in each, and, in our opinion, the defence finds no support in any of them.

The fallacy of the argument for the alleged organic change consists, as was properly urged in the argument for the plaintiff, in the failure to distinguish between the railroad, the constructed work of the company, and the company itself. Variations in the route over which the road may run do not affect the identity of the corporate body that builds it.

Every one of the successive acts, after the grant of the charter, professes in its title to be amendatory only, and in its provisions is in fact amendatory of the original. The modifications, in some particulars, are but recognitions of the undisturbed stability of the others. None of them touch the vital parts, or impair the integrity of the organic body, as it existed at its first formation. It is the same company executing its undertaken

purpose to push forward its track into the interior portion of the state, deflecting from the line first projected only with the permission of the power that gave it being and conferred its rights, and stopping short of its distant terminus for want of means to continue the work.

The state, in the charter, agreed with the present plaintiff—(the same company, notwithstanding the change in name—and the agreement has not been since modified)—that the company might go on and build the road, and for ninety-nine years (the measure of its corporate life) the "stock" and "the real estate" which may be purchased, connected with and subservient to its works herein authorized, "shall be exempted from taxation." A section relating to the exercise of the taxing power on freight and passengers has been re-called with the assent of the stockholders, but the clause conferring the exemption has never been interfered with, and during the progress of the entire work has subsisted in full force, assuring those who should put their money and property in the enterprise, that the stock and real estate procured by it should not be subject to any tax.

The language comprehends, and is as appropriate to the stock and land, enlarged and acquired, in constructing the authorized deviating and extended track, as that contemplated in the original charter. The clause of exemption can no more be stricken out without impairing the obligation of the contract, than any and all others of its unaltered provisions, unless with the consent of the stockholders.

There are abundant precedents, if any are now needed, to sustain this view. The name and termini of the railroad, authorized in the charter granted to the Wilmington and Raleigh railroad company, were subsequently changed and a part of the line lopped off, and yet when the exemption contained in the charter was claimed and allowed, it was not suggested that the amendments had abridged the rights of the company in this regard. *Wilmington and Weldon Railroad Company* v. *Reid*, 13 Wall., 264.

The very point has been determined at the last term, in a case much stronger in the alterations of the charter, and, indeed, where a new company was formed, and yet was held to possess unimpaired the same right to a limited exemption of its property from public taxes. *Railroad Co.* v. *Com'rs of Mecklenburg*, 87 N. C., 129.

The adjudicated cases cited by defendant's counsel from the reports of the supreme court of the United States are not at variance with the views expressed. In *Tomlin* v. *Branch*, 15 Wall., 460, it is held that when one railroad company, entitled to exemptions, is merged in another with all its property, rights and privileges, the exemptions accompany and adhere to the property of the merged company, but are not extended to the property of the absorbing company, and that consolidation of two independent companies will be presumed not to have been intended to disturb the separate rights and immunities before possessed by each. *Delaware Railroad Tax*, 22 Wall., 206. Yet when a new corporation is formed out of two existing corporations—these latter ceasing thereafter to exist—the law forming the new corporation governs and controls in determining its corporate functions and rights. *Shields* v. *Ohio*, 95 U. S., 319; *Railroad* v. *Maine*, 96 U. S., 499.

The subject is discussed and the authorities commented on in Morawetz Corp., § 543, and the conclusion is that the effect is to be ascertained by examining the provisions of the statute authorizing the merger or consolidation. In our case there is neither.

The plaintiff is entitled to the restraining order and there was error in refusing it.

Let this be certified.

Error. Reversed.

JOHN McRAE v. WILMINGTON AND WELDON RAILROAD COMPANY.

Railroads—Excursion Trains—Contract—Judge's Charge.

1. Railroad companies can make reasonable regulations for the management of trains.

2. The purchaser of a ticket is bound to inform himself of such regulations, and must conform to the custom of the road in transporting passengers.

3. A regulation that persons purchasing tickets for an excursion shall travel upon the train provided for that special purpose, and not upon a regular train, is a reasonable regulation.

4. The managers of an excursion from Wilmington to Washington contracted with the defendant company for a train of cars at a certain sum, and after advertising the time, &c., sold card-tickets at $6.50 for the round trip; after the departure of the train and when it had proceeded a few miles, the defendant's conductor passed through the cars and took up the card-tickets, and in lieu thereof gave coupon-tickets in order that the connecting roads might hold vouchers to obtain their *pro rata* share of the excursion money, in settling with the defendant; *Held*, that this did not change the original contract with the managers.

5. The terms of the contract, contained in the coupon-ticket, did not confer the right upon the plaintiff excursionist to return on a regular train, even at an earlier day than that advertised for the excursion, without paying the regular fare.

6. In a suit by the plaintiff against the company to recover damages for an assault by the conductor who attempted to put him off a regular train unless the fare was paid, the plaintiff testifying among other things that he supposed he had the right to return on any train after the delivery of the coupon-ticket, but was compelled to pay additional fare for such privilege, *it was held* error in the court to charge the jury that they might consider the understanding and agreement of the parties in determining the character of such ticket—there being no evidence of any agreement between the plaintiff and defendant.

7. *Brunhild* v. *Freeman*, 77 N. C., 128, to the effect, that the construction of a contract depends upon what both parties *agreed*, not upon what either *thought*, approved.

McRae *v.* R. R. Co.

Civil Action tried at Fall Term, 1882, of New Hanover Superior Court, before *MacRae, J.*

The plaintiff brought this action to recover damages for an assault and battery, alleged to have been committed on him by E. D. Browning, a conductor on one of the defendant's trains, and the jury returned a verdict assessing the plaintiff's damages at $1,000.

Some time before the 13th of June, 1881, one W. H. Howe and Anthony Maultsby contracted with the defendant company, at a fixed sum, to furnish them a train of cars for an excursion from Wilmington to Washington City and return. The excursion was advertised by them on printed cards as follows:

"GRAND EXCURSION—WILMINGTON TO WASHINGTON CITY AND RETURN—MONDAY, JUNE 13TH, 1881."

"There will be an excursion from Wilmington to Washington City and return, leaving Front street depot at three o'clock P. M., Monday, June 13th, arriving in Washington Tuesday morning at ten o'clock. Returning, leave Washington Thursday morning at five o'clock and arrive in Wilmington Thursday night at twelve o'clock. Rates of fare, round trip, from Wilmington to Washington and return, $6.50." (Also giving rates from intermediate points, and other details not material to the case).

Tickets were issued for the trip in the following form: "Grand excursion from Wilmington to Washington and return—Monday, June 13th, 1881." (Signed by Howe & Maultsby, Managers, and endorsed by Howe).

One of these tickets was purchased by the plaintiff at the published rate of $6.50, less than one-fourth of the regular fare for round trip from Wilmington to Washington, and he took his seat in the cars on the said Monday. When the train had passed Smith's creek, about two miles from Wilmington, the conductor went through the cars, taking up the tickets issued by the said managers, and gave in lieu thereof tickets in the following form:

[326] First Class—Washington and return—Form Special—Wilmington & Weldon Railroad Company—Special limited excursion ticket—Good for one first-class passage to Washington and return, subject to the following contract: "Having purchased this ticket at a reduced rate, I do, in consideration thereof, agree to be bound by and comply with the following conditions in respect thereto: The trip from point of sale hereof to point of destination shall be made within one day from the date of issue stamped hereon. The return from point of departure to point of destination shall be made within one day from date of such departure. This ticket and the check attached are not assignable, and will be good only in the hands and for the transportation of the original purchaser. This ticket and all checks attached shall be used in conformity to the above conditions between June 13th and 17th, 1881, and in any event shall be void on and after June 18th, 1881. This ticket and check attached shall be void unless the foregoing conditions are complied with. This ticket is void unless stamped and dated. In selling this ticket for passage over other roads, this company acts only as agent, and assumes no responsibility beyond its own line. This company assumes no risk on baggage except for wearing apparel, and limits its responsibility to one hundred dollars in value; all baggage exceeding that value will be at the risk of the owner, unless taken by special contract. The checks belonging to this ticket will be void if detached."

The tickets were stamped and dated, and had coupons or checks attached.

There were five different connecting roads between Wilmington and Washington, and each road had its own conductor on the excursion train. The defendant's conductor went no further than Weldon. The reason why the coupon-tickets were issued in lieu of the cards issued by Howe and Maultsby, was merely that the roads beyond Weldon might have vouchers or checks to show the amount of the excursion money due to each, in settling with the defendant. There was at that time a regulation of the

defendant that persons purchasing tickets for an excursion should return by that train, and no other. These regulations were in manuscript and were issued to the assistants of the general passenger agent, and there was no other publication of them, except that the handbills for every excursion contains the time of departure and arrival of the train.

The foregoing facts were elicited from the examination of the witnesses on either side, and are uncontradicted.

In addition thereto, the plaintiff testified that in returning from Washington he was permitted to travel on all the roads from Washington to Weldon on the coupons of the ticket, without paying additional fare. At Petersburg, he heard some one, whom he supposed to be an agent, announce that those who had excursion tickets would have to pay their fare to Wilmington, but the conductor said he would take the coupons, and he did take them. This was objected to but allowed, and defendant excepted. When he got to Weldon, he took his seat in the defendant's regular passenger train for Wilmington. Browning, the conductor, stated that those who had excursion tickets must pay their fare, or get out. He showed the conductor his ticket at Weldon. When the train reached Halifax, the conductor showed him a telegram from one Sanders, and peremptorily ordered him to get off the train or pay his fare to Wilmington. He told him he would do neither, and the conductor then said he would put him off. The witness said, "Be sure you are right, for there will be trouble." The conductor then took him by the arm with both hands; he braced himself against the car; conductor jerked him from the window and called in two negroes; he then paid his fare; Browning seemed to be laughing and chuckling with the passengers, which made the witness feel very badly; he paid the fare because the conductor would have put him off if he had not paid; conductor looked pale, but did not curse or swear, and has remained ever since in the employment of the company.

The plaintiff also stated that he thought he had seen the handbills before leaving Wilmington, and knew that the fare from

Wilmington to Washington and return, on the regular train, was much more than $6.50, and when he left he did not expect he would be able to return on any other than the excursion train; but when he received the excursion ticket he thought he could return at any time. He expected to pay his fare on all the roads between Washington and Weldon, but did not expect to pay between Weldon and Wilmington, because the defendant had issued the ticket. None of the excursionists but himself returned to Wilmington by the train he was on. Some went as far as Halifax, but got off there. He said he did not hear it announced on the cars that the excursionists would have to return on the excursion train.

Howe, one of the managers, testified, on behalf of defendant, that he went through the cars with the conductor as he issued the coupon-tickets, and took up the cards and told the passengers they would have to return on that train, and no other. He made the announcement in each car, but did not know that the plaintiff heard it.

Maultsby, the partner of Howe, testified that he, too, went through the cars with the conductor, and, when asked if the tickets were good to return by any other train, replied that they were issued for that train only, and he could not tell about any other train, and the plaintiff was near by when the announcement was made.

Edens, a passenger on the train, testified that when Maultsby or Howe came through the cars and issued the tickets, he said they would have to return on that train, and it was spoken loud enough to be heard by everybody in the car, and plaintiff was sitting about three feet from him.

Browning, the conductor, testified that on the day the excursion train arrived at Weldon from Washington, he went on his train and announced that all who had excursion tickets would have to pay their fare, or get off the train, and that plaintiff said, "I had better carry him." He told him he had no authority to carry him on that ticket, but he would telegraph to the authorities of

the road for further instructions. When the train reached Halifax, he received a telegram in reply and showed it to plaintiff, and told him he would have to pay his fare. He said he would not do it, and the witness told him he would have to put him off the train, and the plaintiff said "I would have to put him off by force." He had a stick in his hand, and the witness took him by the wrist and told him he would have to get off or pay, and the plaintiff jerked his hand back and said he would pay the fare. Witness was not angry, and testifies this was all he did; he did say to the plaintiff he had train-hands to help him put him off, but did not call them. Several negroes came into the car. He stated that the company's order to him was to make every person, who had not a proper ticket, pay fare or get off the train. He had been conductor on defendant's road for twenty-five years.

Judgment for plaintiff; appeal by defendant. The instructions to the jury are sufficiently stated in the opinion.

Messrs. McRae & Strange, for plaintiff.
Mr. George Davis, for defendant.

Ashe, J. Howe and Maultsby contracted with the defendant for the use of its train for an excursion from Wilmington to Washington and return. They were the managers of the excursion. The excursion was advertised in handbills, over their signatures, to leave Wilmington on the 13th of June, and return on the 17th, and tickets, called cards, were issued by them at the reduced price of $6.50, being less than one-fourth of the price of the regular fare from Wilmington to Washington and back. The plaintiff purchased one of these tickets. They were sold to him by Howe and Maultsby, the managers of the excursion. The contract was with them, and not with the defendant, for a seat in the excursion train for the round trip from Wilmington to Washington.

The only question for our consideration is: did the plaintiff have a right to a seat upon the regular train of the defendant?

Railroads have the power to make reasonable regulations for the management of their trains (1 Red. on Railways, 98; Thompson's Carriers, 306), and with the same qualification of reasonableness, it is also well settled, that one who buys a ticket is bound to inform himself of the rules and regulations of the company governing the transit and conduct of its trains. *Deitrich* v. *R. R. Co.*, 71 Penn. St. Rep., 432. It follows that where a passenger purchases a ticket, he only acquires the right to be carried according to the custom of the road. When he purchases such a ticket, he should inform himself as to the usual mode of travel on the road; and so far as the customary mode of carrying passengers is reasonable, he should conform to it. The requisite information can always be obtained from the agent from whom the ticket is procured; and it is but reasonable to require passengers to obtain the information and to act upon it. *R. R. Co.* v. *Randolph*, 53 Ill., 515.

The evidence shows that at the time of this excursion there was a regulation of the defendant company that persons purchasing tickets for an excursion train should return by that train, and no other; and the regulation is reasonable. For if several hundred passengers on an excursion train could leave that train at any point and take seats in a regular train, it would produce great discomfort to the proper passengers, and intolerable confusion and inconvenience.

The regulation was proclaimed throughout the cars, and in three feet of the plaintiff; and, although he says he did not hear it, it was his business to inquire. But he did have notice, for he admits in his testimony that he had seen the handbills advertising the excursion before he purchased his ticket from the managers. It was subject to this regulation that he made the contract with the managers, and when the ticket, or card, was paid for and received by the plaintiff, the contract between them was consummated, and the rights of the parties were then determined. *Raw-*

son v. *R. R. Co.*, 48 N. Y., 212. Most unquestionably, this contract did not give the plaintiff the right to a seat on the regular train.

The plaintiff insists the contract was changed by the defendant after leaving Wilmington, when its agent, the conductor, took up the card and substituted in its place the coupon-ticket. He admits when he received the ticket from Howe and Maultsby that he had no idea but that he would have to return on the excursion train, but that after receiving the coupon-ticket from the defendant's conductor, he concluded he would have the right to travel upon a regular train of the defendant, but not upon those of the other roads. In other words, that he and the several hundred excursionists, who had purchased tickets at the reduced price of $6.50, were entitled to travel on any of the regular trains of the defendant between Wilmington and Weldon.

The conclusion of the plaintiff is so preposterous, in a business point of view, that it is not surprising that he alone, of all the passengers on the excursion train, should have been the only one who asserted such a right under that construction of the ticket. But the jury, upon the issues submitted under the instructions of the court, seem to have come to a like conclusion.

The question, then, is: was there error in the instructions given to the jury?

The defendant requested the court to submit this issue to the jury: "Was the coupon-ticket issued without any intention of changing the contract between the parties?" The purpose, it seems to us, for which the coupon-tickets were issued by the defendant was a material inquiry; and the intent with which they were issued should have been submitted to the jury as a question of fact to be determined by them. But the court refused to submit the issue, and in lieu thereof submitted the following: "Did the plaintiff have a ticket which authorized him to occupy a seat in a regular train, as alleged in the complaint?" and upon this His Honor charged the jury, that if the plaintiff accepted the coupon-ticket from the agent of the defendant company with

the *understanding and agreement* that it was only to be used upon the excursion tain, and he returned upon another train than that provided for the excursion party, the company would have had the right to demand pay for carrying him upon the other train, "and you should say in response to that issue, no;" but if the plaintiff did not accept the ticket upon this condition, that he was to return on the excursion train, and no other, "you should respond to the issue, yes."

We are of opinion there is error in this instruction. The error consists in leaving it to the jury to consider the understanding and agreement of the parties in determining the character and effect of the coupon-ticket. The understanding of the parties amounted to nothing unless it was mutual and concurrent, and there was no evidence of such a mutual understanding. The defendant understood the ticket as only carrying out the original contract, and issued in lieu of the card only for the purpose, as testified by one of its agents, that the roads beyond Weldon might have vouchers or checks to show the amount of the excursion money due to each, in settling with the defendant. The plaintiff says, on the other hand, that he understood the ticket as giving him the right to ride upon any train of the defendant.

The construction of a contract does not depend upon what either party *thought*, but upon what both *agreed*. *Brunhild* v. *Freeman*, 77 N. C., 128.

The question then arises, was there an agreement between the parties that the coupon-tickets were to be used on the excursion train only, or upon any other train of the defendant? There was no actual agreement, and none can be inferred from the tickets itelf. There is not a word in it about the right or authority to use it on a regular train. So far from that, it bears internal evidence that it was to be used on the excursion train, and no other. It is headed, "First-class, Washington and return, form special, Wilmington & Weldon railroad company, special limited excurson ticket."

We are unable to conceive how any one could suppose that

such a ticket, delivered as it was, on a special excursion train, to a passenger, who had purchased a ticket at a greatly reduced price, with full knowledge that it was to be used on that train only, could give him the right to travel on any other train of the defendant. It could have reference only to the moving special train, upon any reasonable interpretation.

But the plaintiff contends that the contract, contained in the ticket, extended the plaintiff's right to return on the 18th day of June, and as the excursion train, by the contract between the defendant and managers, must return on the 17th, it follows that if he should see proper to defer his return until the 18th, he would have the right to travel on a regular train, and that if it gave him the authority to do so, on that day, it must equally confer the right to do so on the 16th of June. But we cannot concur in that interpretation. The language of the ticket is: "This ticket and all checks attached shall be used in conformity to the above conditions, between June the 13th and June the 17th, 1881, and in any event shall be void *on* and after June the 18th, 1881." The time for the return of the excursion train by the original contract, as well as by the terms of the coupon-ticket, is limited to the 17th of June; and what is added, "in any event shall be void *on* and after June the 18th, 1881," was used to make the limitation to the 17th the more definite—that is, that it should be void on the 18th; as a matter of course it would be void after that date.

The evidence in the case is, that the coupon-ticket was given solely for the purpose of carrying out the original contract between the defendant and the managers, and was no evidence of a change in that contract. His Honor should, therefore, have instructed the jury that there was no evidecee of an understanding and agreement between the plaintiff and the defendant, that the plaintiff might ride on any train of the defendant, except that provided specially for the excursion; and that even if there was such an agreement, it was without consideration. His failure to so instruct the jury is error.

Under this view of the case, it is unnecessary to consider the question of damages, or the other exceptions taken. There must be a new trial. Let this be certified, &c.

Error. *Venire de novo.*

ELSIE L. BRITTON v. ATLANTA & CHARLOTTE AIR-LINE RAILWAY COMPANY.

Railroads, duty of company to protect passengers.

1. A railroad company has a right, and it is its duty, to establish and enforce reasonable rules and regulations for the government and direction of trains; and of such, the passenger must inform himself and conform thereto.
2. The company cannot relieve itself of responsibility for injuries received by a passenger, where it is shown that such rules were not enforced, but their observance left discretionary with the passenger.
3. The right of a railroad company to assign white and colored passengers to separate, though not unequal accommodations, is recognized by the courts.
4. The company owes to every passenger the duty of protecting him from the violence and assaults of his fellow-passengers or intruders, and will be held responsible for its own or its servants' neglect in the premises, when the same might have been foreseen and prevented by the exercise of proper care. The plaintiff in this case was entitled to have the jury instructed that taking the evidence to be true, the company is liable in damages for the injuries sustained.

CIVIL ACTION tried at January Special Term, 1882, of MECKLENBURG Superior Court, before *Bennett, J.*

The plaintiff in this action is a colored woman, and seeks to recover of the defendant company damages for injuries sustained by her, while travelling on its train. The train was a special one for excursionists, running from Atlanta, Georgia, to Charlotte, North Carolina, on the 23d day of July, 1878. Hand-

bills had been posted, advertising the time and terms of the excursion, and that separate cars would be provided for white and colored passengers.

The injuries complained of consisted in her being assaulted by a stranger, and forcibly ejected from the car in which she had been seated—it being the "smoking car," which had been provided for the white male passengers.

The case for the plaintiff is as follows: Having purchased a ticket at Greenville, South Carolina, she, in company with a man and woman belonging to her race, entered the defendant's train and occupied seats in the car in question. No one pointed out to them the cars intended to be occupied by the colored passengers, nor did she know that separate cars had been provided for the two races, or of the regulation of the company requiring it to be done. Before the train left Greenville, some one, a white person, not in authority, began to cast reflections upon the party, saying that "d—d niggers had no business in there," and when under way, others of the white passengers cursed them for being in the car, and declared that they didn't want "niggers" in that car; and for the purpose of annoying them sang vulgar songs and whooped and hallooed at the top of their voices. The man who accompanied the plaintiff, and whose name was Culp, spoke to the conductor in charge of the train about the conduct of the other passengers, and complained of it.

The conductor accepted the tickets of the three, and told them they might sit in that car, but as it was an excursion train he could not control the conduct of the other passengers, and they might expect rudeness. Whenever the conductor was present, the misbehavior would cease, but as soon as he left the car it was resumed. He was appealed to as many as four times to protect them from insult, but each time said he could not help it. While the train was stopped at King's Mountain station, a white man, whom none of the party knew, ordered them out of the car, when Culp asked to see the conductor. The man went out, soon others came in and said to Culp, "get up and go out of

here." He again asked to see the conductor and retained his seat, whereupon he was seized, beaten, and finally ejected from the car. The same persons then seized hold of the plaintiff, beat and badly bruised her, and finally put her and her companion out of the car, and threw their baggage upon the platform.

The plaintiff then went into another coach, which was filled with colored people, every seat being occupied, so that she had to stand for some time after the starting of the train, when some one got up and gave her a seat.

During the time the plaintiff and her companions were being ejected, neither the conductor nor any other employee of the defendant was present to protect them; nor did she see the conductor until after the train was in motion, when he came to where she was standing, and, when informed of what had taken place, said that he knew nothing about it; and that none of the other passengers knew anything about it. He gave her no seat, but went out, leaving her standing, and it was only through the kindness of another passenger that she got one at all, and then it was by an open window, and being at night, she took violent cold.

The case shown by the defendant is as follows: The excursion had been extensively advertised by large handbills, in which it was announced that separate coaches would be provided for white and colored passengers. The train at Greenville was composed of six coaches, all substantially alike as to their conveniences and accommodations—the two next to the baggage car being reserved for colored passengers, the third as a smoking car for whites, and the others for whites generally. There was no notice on either the outside or inside of the coaches to indicate which were intended for whites, or which for colored people, though at Greenville there was an announcement made to that effect by one of the brakemen in defendant's service. After leaving that station, the conductor, in passing through the train, found the plaintiff and her party in the smoking car, and called

for and accepted their tickets. He then said to them that the two forward coaches were intended for persons of their color, to which they replied that they were pleasantly situated, and preferred to remain where they were.

The instructions given by the company to the conductor were to advise such colored passengers as he might find in the coaches set apart for whites to go to the others, but if they declined to do so, to allow them to remain where they were, so long as they conducted themselves properly.

At some point before reaching King's Mountain, the colored man, Culp, in the presence of the plaintiff, complained to the conductor of the rudeness of some of the white passengers towards himself and his companions, and of the indecent language used in their hearing, when he was again told that he would find a pleasanter seat if he would go into the forward coaches, in which, at that time, there was a number of vacant seats.

The white persons in the coach, who were known to the conductor to be "wild young men from Atlanta, on a spree," also complained of the presence of these colored persons in the coach, and inquired of that officer if he did not mean to put them off?

At another time, the party complained to the conductor of being cursed and insulted by the others, when he said to them, that while he would not require them to go into the other car, he would still advise them as a friend to do so, and expressed some surprise at their unwillingness to do so, whereupon Culp said he desired to go, but that the females under his charge were unwilling.

The behavior of the plaintiff and her companions while in the car was entirely becoming, and their dress and appearance decent.

The train stopped at King's Mountain at eight o'clock P. M., and while there, one Ramseur, who was neither a passenger nor employee on the train, entered the smoking car, for the purpose of seating some white women who came in with him. The seats being filled, and seeing the two colored women there, he asked

for their seats, which they declined to surrender. Some one in the crowd proposed to put them out, to which Ramseur assented and seized hold of the plaintiff. Thereupon Culp cried out, "don't strike that lady," when Ramseur struck him over the head with a stick, and then, with the help of some of the white passengers, ejected all three from the car.

At the time of this occurrence, the conductor was in the baggage car, with the baggage-master, receiving and delivering baggage; and the other train hands, of whom there were three, had been sent for water to refill the coolers in the coaches. While there, the conductor was told that a row was about to take place in the smoking car, and that his presence was needed, to which he replied that he would go as soon as he could start the train. In a minute or so he rang his bell, and as soon as the train moved, he started to the scene of disturbance, but when he reached the second coach from the baggage car, he there found the plaintiff and her friends. She was standing up and made serious complaints of his not having been present to protect her. He told her that she should have a seat; but by this time every seat was occupied, so that he was unable to provide her with one, and consequently had to leave her standing.

Amongst others the following instructions were asked:

1. That upon the evidence, taken as a whole, the plaintiff was entitled to recover of the defendant compensation to the extent of her injuries.

2. That being permitted by the conductor to remain in the coach, she was rightfully there, and was under no obligation to give up her seat to another, when ordered to do so, either by a fellow-passenger or an intruder into the train.

3. That being rightfully there, it was the duty of the servants of the defendant to protect her, and to see that she was neither insulted nor injured by her fellow-passengers, and for their failure in this regard the company is liable.

The instructions given were substantially as follows: The defendant, as a common carrier of passengers, had the right in

making up its train, to provide and set apart certain coaches for the exclusive accommodation of persons of each race; there is no law which prohibits their doing so, provided they observe substantial equality in the accommodations provided for both. If, on the occasion of this excursion, the defendant had made such provision for separate coaches for the two races, it was its duty to give notice of that fact to the passengers, and especially the colored ones. If the plaintiff, being a colored person, entered the coach in question set apart for whites, and while there demeaned herself decently and becomingly, no one but the conductor, or some one acting by his authority, had the right to remove her from the coach or to require her to change her seat; and if no such instructions had been given by the conductor, then, when at King's Mountain, she was rightfully occupying the seat. It is the duty of common carriers of passengers to use the utmost care and diligence, consistent with human foresight, to convey their passengers safely, though they are not insurers of their safety. It is equally the duty of carriers to use the same care in protecting passengers against violence and injury at the hands of their servants, and likewise to come to their protection, when they are the object of attack or violence at the hands of their fellow-passengers; and for a failure in the scrupulous discharge of duty in any of the particulars enumerated, they are liable in damages to any passenger whom they may fail to protect.

In conclusion, the jury were told that if satisfied the plaintiff was injured or wronged in the manner complained of, and that such injury or wrong resulted directly from the acts of defendant's servants, or from their failure to exercise that scrupulous degree of care which had been explained to them, then she was entitled to recover of the defendant for the injuries sustained.

The verdict of the jury was for the defendant upon all the issues, and after judgment thereon the plaintiff appealed.

Messrs. T. M. Pittman and *N. Dumont*, for plaintiff.
Messrs. Jones & Johnston and *D. Schenck*, for defendant.

RUFFIN, J. The court has found no difficulty in concurring in many, if not all, of the propositions propounded in the charge of His Honor to the jury, or in the positions assumed by counsel at this bar. No sort of doubt is entertained as to the right, and, in some cases, the duty, of carriers, who undertake to convey passengers for hire, to establish and enforce reasonable rules and regulations for the government and direction of their trains, or as to the duty resting upon the passengers, when uninformed in regard to them, to inquire into and learn their established regulations, and when instructed, to make their actions and movements conform thereto.

Equally well settled does it seem to be, both upon principle and authority, that amongst those reasonable regulations which they have a right to adopt, is the one of classifying their passengers and assigning them to separate, though not unequal accommodations.

This right, as regards the separation of the white and colored races in public places, has been expressly and fully recognized in many of the courts, both state and national. *Westchester R. R. Co.* v. *Miles*, 55 Penn. St. Rep., 205; *Day* v. *Owen*, 5 Mich., 520; *Hall* v. *DeCuir*, 95 U. S. Rep., 485.

In some of the cases, it is said to be not barely a right appertaining to the carrier, but a positive duty, whenever its exercise may be necessary in order to prevent contacts and collisions arising from natural or well known antipathies, such as are likely to lead to disturbances from promiscuous intermingling. If this be so, then in no case does it seem possible that it could so certainly attain to that standard, and become imperative upon the carrier, as on the occasion of an irregular excursion party, composed mainly of irresponsible and excitable individuals.

Satisfied, however, as the court may be of the correctness of the principles asserted, it is still at a loss to perceive what con-

nection they have with the case in hand, or how in any way it could be made to be dependent upon them, since the evidence wholly fails to show that the defendant had, on this occasion, established any fixed or certain rule in reference to the matter. It is true, that the handbills, by which the time and the terms of the excursion were published, announced that there would be "separate cars for white and colored," but whether this was one of the acts of the advertiser, resorted to in order to render the excursion popular with the better paying class of citizens, or whether it was intended to be a regulation for the government of the conduct of all parties, is left altogether uncertain. In the absence of all other proof upon the point, the court might and probably would put the latter construction upon it; but it is impossible to do so when the defendant shows, out of the mouth of its own witness and officer, that the real instruction given to the conductor of the train was, not to enforce it as a law of the company's making, but simply to give advice upon the subject, and then leave it to each individual to determine his or her own course.

The rules and regulation which the carrier has the right to adopt, in matters of this sort, must be such as are reasonable in their nature, and in their demands upon the passenger; and to be this, they must have for their first and main object the safety and convenience of the passenger, and must be uniform, positive, and obligatory alike upon all parties. The carrier is presumed fully to understand the exigencies of such occasions, and how to meet them; and it is for him to decide and see that others obey; nor will the law permit him, by any equivocal or uncertain course of conduct—such as barely giving advice—to shift the responsibility from his own shoulders to those of the passenger.

When the plaintiff and her friends took seats in the coach in question, they did so in the exercise of a right and a discretion expressly left to them by the defendant's own regulation, and were therefore clothed with every privilege that appertained to any other passenger in the coach, and were entitled as fully as

any other to be protected from injuries arising, as well as from the neglect of the company's servants as from the unprovoked assaults of their fellow-passengers; and more especially was this so, after the conductor had been appealed to, and assured them of their right to the seats, even though he did offer the advice which he had been instructed to give them. So that, the right of the plaintiff to recover in this action depends, as we conceive, upon no question connected with her color or with her presence in any particular coach in the defendant's train, but upon the general law regulating the duties and responsibility of the carriers of passengers in all such cases.

While in this state there seems to be no express authority as to the duty of the carrier to afford protection to the passengers against the assaults of his fellow-passengers or strangers, we still have the decisions of other courts in regard to it, which, although comparatively recent, strenuously commend themselves to our consideration, as well by their right reasoning and plain sense of justice as by the high character of the tribunals from which they emanate.

According to the uniform tendency of these adjudications which we admit as authorities, the carrier owes to the passenger the duty of protecting him from the violence and assaults of his fellow-passengers or intruders, and will be held responsible for his own or his servant's neglect in this particular, when, by the exercise of proper care, the acts of violence might have been foreseen and prevented; and while not required to furnish a police force sufficient to overcome all force, when unexpectedly and suddenly offered, it is his duty to provide ready help sufficient to protect the passenger against assaults from every quarter which might reasonably be expected to occur under the circumstances of the case and the condition of the parties. *New Orleans R. R. Co.* v. *Burke*, 53 Miss., 200; *Pittsburg R. R. Co.* v. *Hinds*, 53 Pa. St. Rep., 512; *Pittsburg R. R. Co.* v. *Pillow*, 76 Pa. St. Rep., 510; *Flint* v. *Norwich Transportation Co.*, 34 Conn., 554; Thompson on Carrier, 303.

Tested by this rule, and conceding that the facts of the case were as insisted upon by the defendant, and as proved to be by its own witnesses, the conduct of the defendant's servants, and especially of its condutor, was grossly and unpardonably negligent. He had knowledge of the reckless character of those who occupied the coach with the plaintiff; and while he may not have had positive premonition of threats towards her, he was fully aware of the dissatisfaction to which her presence there, with her companions, had given rise, and of the desire for their expulsion, which had been openly expressed, as well as of the fact that ribald songs and coarse and insulting language had been indulged in for the very purpose of vexing them and rendering their situation intolerable.

Circumstances such as these ought to have aroused, if they did not, the apprehensions of the officer for the safety of the plaintiff, and called for his constant and watchful interposition in her behalf, in order to protect her from insult and injury. His duty at that time was made so plain that the law itself will pronounce upon his conduct, and declare to be inexcusable his negligence in sending off upon other missions every other employee of the company, and betaking himself to the baggage car during the entire stay of the train at that depot. His dalliance, too, in going to her relief when informed of the imminency of the outrage upon her rights, manifested such an indifference on his part as was inconsistent with her claims and his duty. The duty which he owed to the defendant, of looking after the baggage of the passengers and putting the train in motion, was altogether secondary to that which, under the circumstances, he owed to the plaintiff, and should have been promptly subordinated thereto; and his failure to do this was another instance of negligence on his part, which brings responsibility upon the employer.

But above all this, the plaintiff had, as we have seen, acquired an established right to the seat which she occupied upon entering the defendant's train. She held it by the same tenure that

every other passenger upon the train held his seat, and no one had the right either to call upon her to surrender it or to eject her from it by force; and upon being notified that her ejection had taken place, the first duty of the officer was to see her restored to it; and not until this was done, if demanded by her, was his whole duty, or that of the defendant, to the plaintiff, fully discharged.

The liability of the defendant to the plaintiff grows not out of the fact that she was injured, but out of the failure of its servants to afford her protection, after they had reasonable grounds for believing that violence to her was imminent, and also out of their omission to see her righted after the commission of the assault upon her, and her forcible ejection from her seat. The failure of its servants to discharge these duties to the plaintiff stands exactly upon the same footing as would their failure to discharge any other duty which the defendant, as a carrier, owed to her; and upon the maxim *respondeat superior*, their negligence rendered it liable.

Whether there is negligence, when the facts are admitted, or proved, becomes a question of law for the court to determine, and, therefore, this court thinks the plaintiff was entitled to the instruction asked, that, taking the whole evidence to be true, she was entitled to recover of the defendant compensation for her injuries, sustained by reason of the negligence of its servants. Because of the omission on the part of the judge below to give such instructions to the jury, she is entitled to a *venire de novo*.

Error. *Venire de novo.*

*J. VAN LINDLEY v. RICHMOND & DANVILLE RAILROAD.

Railroads—Duty of Connecting Lines—Damages for delay in shipment of freight.

1. The defendant company gave a bill of lading to plaintiff at Greensboro, for transportation of goods *via* Charlotte to Burnsville, Ala., in which it was stipulated that the same are to be transported and delivered to the agents of connecting roads, and by them to the next connecting road, until the goods shall have reached the point named in the receipt, assuming no other responsibility for their safe carriage than may be incurred on its own road or at its own stations. The goods, on arrival at Charlotte, were delivered to the Charlotte, Columbia & Augusta road, and delayed in reaching the point of final delivery beyond the usual time required in transportation; *Held*, in an action by plaintiff for damages caused by the delay, (1) That the defendant, having the control of and operating the C., C. & A. road itself, received the goods at Charlotte, and is liable to the plaintiff, in the absence of proof to show that the detention of the goods occurred beyond the southern terminus of the last mentioned road. (2) The duty of safe carriage attaches as the goods pass into the custody of each company, and ceases only when they are safely delivered to its successor.

2. The measure of damages occasioned by delay in shipment of goods, where the carrier is not informed of the special circumstances causing the loss of the plaintiff's contracts with others, is the difference between their market value at the time they ought to have been delivered, and the time they were in fact delivered, if in equally good condition; and if not, the damages should be increased to the extent of the deterioration resulting from the delay.

3. The verdict as to damages only is set aside and that issue reopened to the end that an inquiry thereof may be made in the court below, according to the rule above announced.

(*Phillips* v. *R. R. Co.*, 78 N. C., 294; *Dixon* v. *R. R. Co.*, 74 N. C., 538; *Mace* v. *Ramsey*, *Ib.*, 11; *Burton* v. *R. R. Co.*, 84 N. C., 192, cited and aproved).

CIVIL ACTION tried at July Special Term, 1882, of GUILFORD Superior Court, before *Gilliam, J.*

Defendant appealed.

*Mr. Justice RUFFIN did not sit on the hearing of this case.

Messrs. Scott & Caldwell, for plaintiff.

Messrs. D. Schenck, J. N. Staples and *Dillard & Morehead*, for defendant.

SMITH, C. J. The plaintiff, Lindley, on behalf of his firm, on October 28, 1880, directed the defendant's agent at Greensboro, using for that purpose a printed form prepared by the company and addressed to "the agent of the Richmond & Danville railroad company" at that place, to transport three boxes of fruit trees, thence to Burnsville, Alabama, at the foot of which was a printed memorandum, "see conditions, other side."

On the reverse page are numerous printed conditions of which that numbered 12 is in these words:

"This company will not receipt for or guaranty the transportation of any article of freight beyond the point to which bill of lading is given. Goods or property consigned to any place off the company's line or road, or to any point or place beyond its termini, will be sent forward by a carrier or a freightman, when there are such, in the usual manner, the company acting for the purpose of delivering to such carrier, as the agent of the consignor or consignee, and not as carrier, they agreeing not to hold the company liable or responsible for any loss, damage or injury to the property, after the same shall have been sent from any warehouse or station of the company."

At the same time, the said agent gave a receipt, in a printed form, bearing the heading, "Piedmont Air-Line Railway," of the said goods, marked, "J. Van Lindley, Ala.. *via* Selma, Rome & Dalton R. R." as follows:

"GREENSBORO, Oct. 28th, 1880.

[No. 20.] Received from J. Van Lindley the following property in apparent good order, contents and value unknown, to be transported to Burnsville, Ala., upon the conditions endorsed

hereon," describing the articles as stated. The conditions to which reference is made are the same as those on the preceding paper.

Thereupon, at the same place and date, a bill of lading was signed by the agent and delivered to Lindley, designated at the top as a "through bill of lading," and with a similar marginal marking, as follows:

"Received of J. Van Lindley, in outward apparent good order, *inward condition of contents unknown*, and for which (viz.: *condition of contents*) *this company or any of its connections* to place of delivery shall not be responsible, —packages, value unknown, to be transported by the Richmond & Danville railroad company to Charlotte, thence by connecting lines to Burnsville, Ala., three boxes fruit trees, released and freight guaranteed, (the italics are in the bill) supposed to be marked and numbered, as per margin, to be transported as above specified and delivered to the agents of the connecting railroad companies or steamers, and by them to be delivered to the next connecting railroad company or steamer, until said goods or merchandise shall have reached the point named in the receipt. As the packages aforesaid must pass through the custody of several carriers, it is understood as a part of the consideration on which said packages are received, that the exceptions from liability made by such carriers respectively shall operate in the carriage of them respectively of said packages, as though inserted herein at length * * *. And it is expressly understood, that for all loss or damage occurring in the transit of said packages, the legal remedy shall be against the particular carrier in whose custody the said packages may actually be at the time of the happening thereof; it being understood that the Richmond & Danville railroad company, in receiving the said packages to be forwarded as aforesaid, assumes no other responsibility for their safety or safe carriage

than may be incurred on its own road, and it is expressly confined to the road and stations of the Richmond & Danville railroad company."

The goods were forthwith, and without delay, conveyed on the train of the next day to Charlotte, and on the 30th day of October were delivered to the Charlotte, Columbia & Augusta railroad, arriving at their destination on the 15th of November thereafter.

The Richmond & Danville, the North Carolina, and the Charlotte, Columbia & Augusta railroads, all under the control of the defendant company, constitute in their connections what is known as the Piedmont Air-Line Railway. There are three other lines of railroad to be traversed after leaving Augusta before the articles reach the place of final delivery to the consignee, and six days is the usual time required in transportation, and it was not shown on which of the roads, south of Charlotte, the default occurred. In consequence of the delay, the plaintiff's numerous contracts of sale of the trees to persons at and near Burnsville, to whom those sent were delivered on the 9th day of November, were forfeited; to obviate the losses of which, they made strenuous efforts to dispose of them to others, and, as compared to the sums to be paid under the contracts, suffered a damage of several hundred dollars.

The defendant company, under the contract expressed in the bill of lading, specifically undertakes to carry the goods over its road from Greensboro to Charlotte, and then, acting as a forwarding agent of the plaintiff, to deliver them to the next carrier on the line of transportation to the point of ultimate destination in Alabama, and the like obligation is assumed for each of the successive carriers.

This duty would in law result from an association of the companies, under a common arrangement among them to receive from each other and forward the goods on to the place of ultimate delivery, in the absence of a contract by the receiving company

itself to carry the goods over the whole route, using the successive lines as agencies of its own in fulfilling its stipulation. Indeed, it seems to have been doubted whether the contract for the entire transportation did not rest solely upon the receiving carrier; and, again, whether one corporation could contract to convey goods beyond the limits of the state which gave the company corporate existence. But it is now settled, in accordance with the necessities of commerce, that a receiving company may undertake to carry goods beyond the limits of its own road and of the state in which it is chartered, and assume all the responsibility incident to such undertaking; while in the absence of such contract, "it is only liable for the extent of its own route and the safe storage and delivery to the next carrier." 2 Redf. on Railways, §§ 162, 163, and notes; *Phillips* v. *R. R. Co.*, 78 N. C., 294.

The terms of the defendant's contract are plainly and distinctly defined in the words, "to be transported as above specified, and delivered to the agents of the connecting railroad companies or steamers, and by them to be delivered to the next connecting railroad or steamer, until said goods or merchandise shall have reached the point named in the receipt."

The obligation resting on each, attaches as the goods pass into its custody, and ceases only when safely carried and delivered to the successor. The defendant company, it is explicitly declared, "assumes no other responsibility for their safety or safe carriage than may be incurred on its own road, and it is expressly confined tothe *roads* and *stations* of the Richmond & Danville railroad company."

Now, the Richmond & Danville railroad company control, manage and operate the three roads forming the Piedmont Air-Line Railway, and is consequently answerable for default in the corporate management of each. The freight was not strictly received on the Richmond & Danville railroad, nor conveyed over any portion of it, but it passed into the custody of the company bearing that name, and it agrees to convey over and be responsible for the safe carriage of the goods over *their North*

Carolina railroad track, designating it by their own name, and properly, because solely operated by it.

The clause which we have just quoted from the contract does not mean, in restricting its liability "to the roads and stations of the Richmond & Danville railroad company," to confine it to the line of road between Richmond and Danville or Greensboro, since it would in such case have contracted no obligation whatever, as no portion of it was to be traversed; nor was it intended to exclude the defendant, as managing and operating also the Charlotte, Columbia & Augusta railroad, from its proper responsibility as a carrier over that road. Indeed, such a contract, if made, would be in effect to absolve the defendant company from all liability for negligence in carrying the goods over that portion of the route, and would be utterly forbidden by public policy, and void. The defendant company, then, as representing and operating the line of the Charlotte, Columbia & Augusta railroad in the place of that corporation, receive the goods at Charlotte in due time, and fifteen days thence elapse before they reach the consignee at Burnsville, in a damaged condition; and there is no explanation as to how or where the needless detention occurred, nor upon which of the roads on the route the culpability rests therefor.

In our opinion, the defendant company, in the absence of such evidence, as representing the last company whose road is under its control, in the course of transmission, must be held responsible for the injury suffered by reason of the delay.

"It seems to be regarded as settled," says Judge REDFIELD, "that the persons or corporation who come into the use of a railway company's powers and privileges are liable for their own acts while continuing such use, and also for the continuance, permissively, of any wrong which had been perpetrated by such company upon land-owners or others, by means of permanent erections, which still remain in the use of the successors." § 145, par. 2.

And so the non-delivery, or delivery in bad condition by the last of the lines, connecting with the defendant, by which the goods ought to have been carried after they left defendant's hands, is *prima facie* evidence of default in the defendant. Abb. Trial Evi., 571; *Laughlin* v. *R. R. Co.*, 28 Wis., 204 (9 Amer. Rep., 493); *Dixon* v. *R. R. Co.*, 74 N. C., 538.

But we think there is error in the rule laid down by the court for estimating the damages of the plaintiff, which was, in substance, the loss of the fruits of the several contracts with purchasers in consequence of their inability to make deliveries in time.

In *Horne* v. *Mid. Rail. Co.*, the plaintiffs had made a contract to deliver shoes for the use of the French army at a very high price, and at a fixed time. Information was given the defendant of the time of contract-delivery, but not of the special nature of the contract. The delay in transportation prevented a compliance with the terms and the contract was lost. It was held that the defendant was not liable for the difference between the ordinary market value of the shoes and the contract price—not having been informed of the special circumstances that led to the loss. L. R., 7, C. P., 583, affirmed in L. R., 8, C. P., 131. In this case the judge said: "There must, if it be sought to charge the carrier with consequences so onerous, be distinct evidence that he had notice of the facts, *and assented to accept the contract on those terms.*" Wood's Mayne on Damages, §§ 34, 38, 41.

In *Mace* v. *Ramsey*, 74 N. C., 11, the contract, for violating which the action was brought, was for the construction of a boat to be used for the accommodation of persons expected on an excursion train, and the plaintiff engaged this boat and passengers to fill it. The boat was not built in time, and consequently the fares of the passengers engaged were lost. It was declared that, as this contract was for a specific occasion and purpose, and

the damage immediately and necessarily follows the breach, it was reasonably contemplated by the parties and could be recovered.

The true measure of the damages in the present contract, in the absence of any information to quicken the diligence of the carrier and enable him by greater activity to avert the loss, is the difference between the market value of the goods at the time when they ought to have been delivered and were in fact delivered, if in equally good condition; and if not, with an increase to the extent of the deterioration resulting from the unnecessary delay in forwarding.

Following the practice pursued in *Burton* v. *R. R. Co.*, 84 N. C., 192, we re-open the issue as to damages, and remand the case to the end that an inquiry thereof be made in the court below. The appellant will recover the costs of the appeal. Let this be certified, &c.

PER CURIAM. Judgment accordingly.

R. R. CRAWFORD & CO. v. GEISER MANUFACTURING COMPANY.

Contract, breach of—Measure of Damages.

1. A paper-writing as follows: You will please furnish threshing machines (describing them) to be shipped to Salisbury on or before May 1st, 1881, at a discount of 30 per cent. from price-list, to be paid by draft at date of shipment, &c., signed by both parties to the transaction, is a contract sufficiently explicit to support an action for its breach.

2. The measure of damages for a failure to furnish the machines is the difference between the contract price and their market value at Salisbury, on the first day of May, 1881, less the cost of transportation.

3. The expenses incurred by the plaintiff in sending an agent to the defendant in reference to the matter, are not to be included in the damages resulting from the breach of the contract.

4. The case is remanded to the end that the damages may be assessed as herein directed. The verdict and judgment in other respects are not disturbed.

(*Burton* v. *R. R. Co.*, 84 N. C., 192, cited and approved).

CIVIL ACTION tried at Fall Term, 1882, of ROWAN Superior Court, before *Gudger, J.*

The action was brought for a breach of contract. The plaintiff alleged that he and the defendant, a corporation organized by the laws of Pennsylvania, whose principal place of business was at Waynesboro, in said state, entered into the following contract on the 28th of August, 1880:

WAYNESBORO, Franklin Co., Pa.

Geiser Manufacturing Company: You will please furnish, marked to me at Salisbury, N. C., six No. 2 separators [threshing machines], four of said machines to have horse-powers and to be changed to suit the trade, either to be on two or four wheels, as seem best, and to be shipped on or before May 1, 1881, at a discount of 30 per cent. from the list of the Geiser Manufacturing Company, to be paid by draft at date of shipment, and any engines wanted, at a discount of 25 per cent. from list, payable when shipped. (Signed by the plaintiff and the defendant).

On the first day of March, 1881, the plaintiff informed the defendant that he was ready to pay cash for the machines, and requested that an invoice be sent by mail, at once, for the articles described in the contract, and, about the 19th of April following, offered to pay defendant for them, and requested a shipment according to the contract; but defendant declined to accept payment, and refused to ship the machines. The plaintiff further alleged a readiness to comply with the contract, and that he

has been subjected to inconvenience and damage, by reason of the failure to perform the same on the part of the defendant.

The defendant, answering, admits the writing set forth in the complaint and alleged to be a contract, and which the defendant refers to as a "letter," to be correctly set forth; but denies that it in any way binds the defendant to furnish the machinery therein referred to, at the prices therein specified, or to furnish them at all; that upon the face of said letter, it is, at most, a written request to furnish the machines at the prices designated, and is in no way binding or obligatory upon the defendant. The defendant admits the receipt of the "letter" from plaintiff, and intended to comply with the request, although not bound to do so, until the early part of the year 1881, when the defendant closed out a contract with a firm in Richmond, Virginia, for a sale of these machines, and on the 9th of February, 1881, notified plaintiff that in consequence of the creation of such agency, the defendant could not comply with the request of August 28, 1880, but that being still willing to accommodate the plaintiff, so as not to interfere with the contract with the firm in Richmond, notice in writing was given the plaintiff, on April 4, 1881, that if plaintiff would give defendant a guaranty to sell the machines at factory prices, with freight added, the defendant would furnish the machines, to which the plaintiff refused to comply. To secure such guaranty, the defendant enclosed a bond to be signed by plaintiff, which was also declined, and this was done before any demand for the machines; and that plaintiff could not have sustained any damage; nor was defendant legally bound to furnish the machines after the plaintiff refused to sign the bond.

The following issues were submitted to the jury:

1. Did the defendant contract to sell and deliver to the plaintiff the machines mentioned in the complaint, at the prices stated?

2. Was the plaintiff able, and did he offer to comply with his part of the contract?

3. Did defendant fail to comply with its part of the contract?

4. What damages did plaintiff sustain by reason of defendant's failure to comply with the contract?

The plaintiff testified, among other things, that he was at Waynesboro when the defendant company was closing business, and made the said contract, which was then reduced to writing by the secretary of the company, and signed by both parties; that he contracted to sell two of the machines at list prices, and could have sold them all at those prices.

Lynch testified for plaintiff, that on the 19th of April, 1881, at the instance of plaintiff, he went to see defendant at its place of business, Waynesboro, and offered to pay for the machines, and demanded their shipment; he offered the money but defendant refused to accept it, or to ship the machines, unless plaintiff would give a bond not to sell them at less than list prices and freight charges; his expenses in going there were ten dollars; he did not agree, as agent of plaintiff, that the bond required would be given.

The defendant offered in evidence several letters between the parties. The only one of importance is that addressed by defendant to plaintiff, dated April 28, 1881, in which defendant says: "Yours of 26th received and noticed. We knew nothing of the transaction you speak of, until long after we sold you the machines, or rather contracted with you for them; and if you mean what you say, the bond will do you no harm and keep the price where it should be."

The defendant requested the court to charge the jury that the paper-writing offered, dated August 28, 1880, as the evidence of the contract, is so defective and uncertain that it cannot be enforced, and the plaintiff cannot recover upon it. Refused, and defendant excepted.

The court charged that if the jury believed the defendant had failed to comply with the contract made on the 28th of August, 1880, the plaintiff could recover; and that the measure of damages would be the difference between the price agreed upon and

the market value of the machines in Salisbury, and also the actual expenses the plaintiff had incurred by reason of defendant's breach of contract; and if they found for plaintiff, they might allow interest.

The jury responded to the first three issues in the affirmative, and assessed the plaintiff's damages at $667, with interest. Judgment; appeal by defendant.

Mr. John S. Henderson, for plaintiff.
Messrs. McCorkle & Kluttz, for defendant.

ASHE, J. The only point presented by the record, as raised in the court below, is the exception of the defendant to His Honor's refusal to give the instructions asked, to-wit, that the paper-writing, dated August 28, 1880, as the evidence of the contract, is so defective and uncertain that it cannot be enforced, and as the plaintiff's demand is based thereon, the plaintiff cannot recover in this action. The instruction was properly refused.

The contract is sufficiently explicit to maintain the action. Any one who reads the paper-writing would at once understand its import: that it is an agreement on the part of the defendant to furnish the articles therein described, on or before May 1st, 1881, for which the plaintiff was to pay the defendant, at date of shipment, by his draft of that date, the amount of defendant's published prices for said articles, less by discount of 30 per cent. There is no uncertainty or ambiguity about it. The defendant understood it. There is no allegation, or even pretence in the answer that there was any such indefiniteness in the terms of the writing, as that insisted upon in the prayer for instructions and the argument of his counsel before this court.

One of the defences set up by the answer was, that the paper-writing was a mere request, on the part of the plaintiff to the defendant, to furnish the machines, and was not a contract. If not a contract, why sign it? "A contract is an agreement upon sufficient consideration to do or not to do a particular thing."

2 Blk., 440. The plaintiff proposed to the defendant, in writing, to pay it a certain sum if it would ship to plaintiff a certain number of machines, on or before the first of May, 1881. The defendant signed the writing, which is equivalent to saying, "I accept your proposition and will ship the articles according to your proposal." The defendant signed the writing, which, in the answer, is called a "letter," when it well knew it was not a letter, but was a contract, written by its secretary at its place of business in the state of Pennsylvania. It had recognized the writing as a contract, prior to the action. As late as April 28, 1881, in a letter of that date, the defendant wrote: "We knew nothing of the transaction you speak of, until long after *we sold you the machines, or rather contracted with you for them.*"

The only other defence was the lame and flimsy excuse that it had made a contract with a firm in Richmond, Virginia, to sell its machines, and that a compliance with the contract with the plaintiff would interfere with that arrangement, and, therefore, it could not comply.

The controlling motive in failing to perform its part of the contract was evidently the apprehension that if the machines were delivered, the plaintiff might undersell its Virginia agent; hence this unwillingness still to deliver the machines, unless the plaintiff would give the defendant a bond not to sell them for less than the factory prices—thus attempting to impose new conditions upon the plaintiff, which he thought unreasonable, and set up his refusal to accept them, as matter of defence to its liability to damages for the breach of its contract.

While we hold there is no error in the judgment of the superior court in regard to the liability of the defendant upon the contract sued on, we are of the opinion there was error in the judge's charge as to the measure of damages.

The expenses of the plaintiff in sending an agent to the defendant, at Waynesboro, was not such an expense as necessarily resulted from the contract.

The true measure of damages in this case is the difference in the contract price of the machines and their market value at Salisbury, on the 1st of May, 1881, less the cost of transportation.

The verdict is not to be disturbed except as to the damages, and to that end the case is remanded that an inquiry may be had as to the damages, in conformity to this opinion. The judgment will, therefore, be reformed so as to open that issue only, and in other respects it is affirmed. *Burton* v. *R. R. Co.*, 84 N. C., 192; *Lindley* v. *R. R. Co.*, *ante*, 547.

PER CURIAM. Judgment accordingly.

W. A. ROBERTS v. RICHMOND & DANVILLE RAILROAD COMPANY.

Railroads—Negligence—Damages—Stock Law.

1. The *prima facie* evidence of negligence on the part of a railroad company in a suit for damages for killing stock (Bat. Rev., ch. 16, § 11) is not impaired by a local act requiring stock to be fenced in, but the defendant must repel the presumption by satisfactory proof to the jury.
2. The fact that the "stock law" makes it unlawful for the plaintiff to permit his cow to run at large, affords no excuse for an injury to her resulting from the defendant's negligence.
3. The measure of damages in such case is the difference in the value of the cow and that of the beef.

(*Gunter* v. *Wicker*, 85 N. C., 310; *Doggett* v. *R. R. Co.*, 81 N. C., 459; *Durham* v. *R. R. Co.*, 82 N. C., 352; *Burton* v. *R. R. Co.*, 84 N. C., 192, cited and approved).

CIVIL ACTION tried at Fall Term, 1882, of MECKLENBURG Superior Court, before *Graves*, *J.*

This action was commenced before a justice of the peace to recover damages for killing a cow of the plaintiff. The cow, without the plaintiff's knowledge, escaped from the enclosed

pasture ground in which she had been confined, and strayed off and, from a crossing highway, entered upon the track of the defendant's railroad and was seen by the engineer of an approaching train when a mile distant as she came out of a "cut." It was midday; the train consisted of eighteen loaded cars; the engineer applied the brakes and blew the whistle to frighten the animal and make her leave the road, but to no purpose; the cow was struck by the train, before it could be stopped by the appliances at hand, and instantly killed; her value, when alive, was thirty dollars, and her dead body was worth for food about two-thirds of that sum.

Verdict and judgment for plaintiff; appeal by defendant.

Messrs. Burwell & Walker and *E. K. P. Osborne*, for plaintiff.

Messrs. D. Schenck, Reade, Busbee & Busbee and *Flemming & Robertson*, for defendant.

SMITH, C. J. By a local act applicable to the county of Mecklenburg, where the collision occurred, it is made unlawful for live stock to roam at large in that county, and the owner, who negligently permits it, commits an indictable offence. Act 1876–'77, ch. 122.

The errors assigned in the record brought up by the defendant's appeal, are in the refusal of the court to give to the jury the following instructions:

1. If the plaintiff, being required to keep his cattle fenced in, allowed his cow to stray off and go upon the company's road where she was exposed to injury and was injured by the train, he was guilty of contributory negligence and not entitled to recover.

2. In such case, if liable at all, the defendant would be only liable for the consequences of gross negligence in its officers and agents.

3. The measure of damages is the difference in the value of the cow when living and when dead, as she was fit for human food.

4. The defendant also imputes error in the charge that the action being brought within six months, the act of killing under the statute (Bat. Rev., ch. 16, § 11) affords *prima facie* evidence of negligence and requires the defendant to rebut it.

We do not ascribe to the local act, which dispenses with enclosing fences in the county of Mecklenburg, and forbids the running of stock at large within its limits, the force and effect attributed to it in the argument for appellant. Its provisions are necessary and intended only to subserve the general policy of the enactment, and the general license which elsewhere permits stock to roam at large, is here withdrawn. But conceding even this temporary and unobserved escape of the cow from confinement to be *unlawful*, it affords no excuse for an injury resulting from the carelessness and direct mismanagement of the colliding train. The presence of the cow on the track, wrongful though it may have been, did not relieve the person in charge of the train from the obligation of running it with due care and caution, so as not needlessly to inflict injury upon the property of another. The principle is thus announced in the recent case of *Gunter* v. *Wicker*, 85 N. C., 310:

"Notwithstanding the previous negligence of the plaintiff, if, at the time when the injury was committed, it might have been avoided by the exercise of reasonable care and prudence on the part of the defendant, an action will lie for damages;" and again, "the plaintiff's negligence must have been a proximate cause of the injury, not an occasion for it only, in order to bar a recovery."

This is a salutary and just rule of responsibility in cases where there is concurrent negligence, in different degrees, producing the result.

The statute which presumes negligence from the unexplained fact of injury done, is not repealed, nor its force impaired, by a

local act which requires stock to be fenced in and not suffered to roam upon the unenclosed fields of others, and we see no reason why it should not equally apply in this as in other counties. The presence of stock on the road is essential to the injury in one case as well as in the other, and if this proceed from the want of care in running the train, why should not the same remedy be open to both, and the same evidence available to fix the responsibility? *Doggett* v. *R. R. Co.*, 81 N. C., 459; *Durham* v. *R. R. Co.*, 82 N. C., 532.

The court, therefore, ruled correctly in explaining the statutory presumption, and leaving the facts relied on to repel it to be considered by the jury. Nor was there error in refusing the second instruction as to gross negligence. If there was negligence, there was responsibility; and so the jury were directed.

But we think the court ought to have given the instruction in respect to the measure of damages. The plaintiff is entitled to compensation to the extent of the injury done in actions for trespass—not as in trover to the full value of the property converted. The cow, as the plaintiff testified, was worth from eighteen to twenty dollars, as beef, and was his property still. If she could have been sold for that sum, or was worth it to the owner, he should have made such reasonable use or disposition of the cow as would have proportionately diminished his damages. This rule is established, and we concur in it as a reasonable rule, by *R. R. Co.* v. *Finegan,* 21 Ill., 646; 1 Thomp. on Neg., 539.

Pursuing the course adopted in *Burton* v. *R. R. Co.*, 84 N. C., 192, where the only error was in the ruling as to damages, we set aside the finding on that issue, and award a new trial upon it, and in other respects affirm the judgment. For this purpose we remand the case.

PER CURIAM. Judgment accordingly.

W. D. FARMER v. WILMINGTON & WELDON RAILROAD COMPANY.

Railroads—Contributory Negligence—Proximate and remote cause of injury—Common of Pasture.

1. Where an injury results from negligence and the act of the plaintiff is directly connected and concurrent with that of the defendant, the plaintiff's negligence is the proximate cause of the injury and will bar his recovery in a suit for damages; but where the negligent act precedes that of the defendant, it is the remote cause, and the defendant will be liable if the injury could have been avoided by the exercise of reasonable care.

2. Plaintiff's mule was killed by defendant's train; *Held*, that even if the plaintiff was guilty of contributory negligence in turning the mule out of his enclosure, he is entitled to recover damages if defendant could have prevented the accident. But the plaintiff had the right to turn out the mule, and the act can in no sense be considered as contributory negligence.

3. The law in reference to "common of pasture" touched upon and discussed by ASHE, J.

(*Burgwyn* v. *Whitfield*, 81 N. C., 261; *Gunter* v. *Wicker*, 85 N. C., 310, and case cited, approved).

CIVIL ACTION tried at Fall Term, 1882, of WILSON Superior Court, before *MacRae, J.*

Plaintiff claims damages occasioned by the running over and killing his mule by defendant's train.

The following issues were submitted to the jury:

1. Did defendant negligently kill the plaintiff's mule?

2. What was the value of the mule?

The jury responded in the negative to the first issue. Judgment against the plaintiff for costs.

On the trial, the plaintiff testified in his own behalf that he was the owner of a mule which was knocked off the track and killed by defendant's train on the 16th of June, 1880; that he lived on the east side of the road, about fifty yards from the track, his horse lot being on the same side and about the same

distance from the track, and his well about same distance on the west side; there is a public road leading across the track, over which his stock, when turned out of the stables, were in the habit of going to the well for water; there is also a field on either side of the track; the fence on the west side is about seventy yards from the track, and that on east side about sixty, the former extending a mile, the latter only about seventy yards, not as far as the point where the mule was killed. When the witness' attention was first directed to the mule, he was grazing on the road-side about sixty feet from the track, and when the whistle of defendant's locomotive commenced blowing, the mule became frightened and ran along the side of the track in a little foot-path, and was struck, when attempting to cross, about one hundred and fifty yards from the crossing, on the south side of which is a deep "cut" extending a hundred yards or more. At the crossing the road is level, up grade going north to the crossing, down grade after passing it, straight track, one on the locomotive could see a mule five hundred yards on the track, the whistle was blown considerably one hundred and fifty yards before the train struck the mule, when the witness noticed that the train "jarred back," and did not think it slacked its speed.

The engineer (McSween) testified that the train was running at the rate of twenty-eight or thirty miles an hour, and was supplied with all necessary machinery and air-brakes of the most approved kind. When he got out of the "cut" (he could see nothing before he got out) he saw the mule grazing on the side of the road. He stood on the right side of the engine, the mule was on the same of the road, about two hundred yards ahead, in the jam of the fence, about sixty-five feet from the track, he blew the cattle alarm a great many times, and applied the brakes which were attached to each coach in good condition, and worked from the engine, the mule ran about fifty yards on the right side of the track, and was seen by the witness about two hundred yards ahead, coming towards the track, and as soon as he discovered it, he put on the brakes, and stopped the train as the

"sleeper," the last car, reached the place where the mule was struck. He stopped a second or two only, used all the preventives he could, had been an engineer for thirteen years, and on defendant's road four years, the train running as it was could not be stopped in less than two hundred and fifty yards.

A passenger on the train (Carraway) was next examined as a witness for defendant. He stated that he observed an unusual amount of blowing, and that the train "slowed down," started off again with whistle blowing, felt a jar, looked out of the window and saw the mule fall, the train came near enough to a stop for the witness to have got off, the whistle blew several times on the other side of the crossing, but got pretty well under way, at the rate of seven or eight miles an hour, when the mule was struck, the jarring may have been caused by the application of the brakes.

Horn, another witness for the defendant, was on the same train, heard the cattle alarm blown, felt the brakes go down, looked out of the window and saw the mule fall.

Knight, the master of transportation on defendant's road, stated that the train was well supplied with brakes, the schedule time was about thirty miles an hour, including stoppages, but the running between depots was much faster. He also testified to the good character of the engineer.

George V. Strong, an attorney, who examined one Jesse Dancy, a witness for plaintiff on a former trial, and took notes of his testimony, stated his testimony to be, that the mule was feeding in the cart-path and lock of the fence, the whistle blew and the mule ran down a foot-path forty or fifty yards, when it first blew the train was two or three hundred yards off, and a hundred and fifty or two hundred yards from the crossing, and was twenty-five or thirty yards from the mule when it blew the last time, the path was thirty feet from the centre of the track, the train did not slack up before it struck the mule, but slacked a little afterwards; on cross-examination, stated that the whistle blew at the

crossing, and again when nearly opposite the mule, the train might have slacked some, the mule was gray, and could have been seen a great distance on the track.

Several witnesses testified as to the good character of the plaintiff.

His Honor, among other things, charged the jury, that cattle owners in this state are not bound to keep them in enclosures to prevent trespass upon others, but if the jury are satisfied from the evidence that the plaintiff, knowing the train would pass that point in a short time, turned the mule upon the track of defendant and left it there, and this action of his contributed directly to the injury complained of, the plaintiff would be guilty of contributory negligence and would not be entitled to recover. The plaintiff excepted, and then requested the following instruction: If plaintiff was guilty of negligence in turning his mule out, yet, if defendant by the exercise of proper care could have avoided the injury to the plaintiff's mule, the plaintiff is entitled to recover. This was refused, and the plaintiff excepted and appealed from the judgment.

Messrs. Strong & Smedes, for plaintiff.

No counsel for defendant.

ASHE, J. We are of the opinion there is error in the instruction given to the jury, and in the refusal to give that requested.

By the common law, every person is obliged to confine his animals to his own premises, but in this state the common law has never obtained in this respect. In the early settlement of the country, when the population was sparse and there were vast tracts of unenclosed lands, cattle were permitted to run upon what was called the "range"; and although strictly unlawful when they grazed upon the unenclosed lands of any one besides their owner, it was a trespass, winked at by the law. By a kind of tacit consent, each farmer was recognized as having a "*common de vicinage*" upon the unenclosed lands of his neighbor. The

usage so long prevailed that it came to be considered as a right; and as cattle in the "range" were likely to break into and trespass upon enclosed lands, the legislature passed the law in regard to fences, making it indictable for any one to have about a cultivated field, in crop time, a fence less than five feet high; and again providing that no person should recover any damages done by horses or other stock upon his enclosed grounds, unless he could make it appear that he had a good and sufficient fence. The object of which legislation seems to have been, to fence out one's neighbor's cattle, rather than to fence one's own in, thereby recognizing the right to turn one's cattle to feed upon the "range." *Burgwyn* v. *Whitfield*, 81 N. C., 261.

If, then, it is no trespass for cattle to wander upon unenclosed lands, and persons whose cattle stray upon an unfenced railroad track are not thereby placed in the position of wrong-doers, it follows that railway companies are liable for the ordinary negligence of their servants toward such animals. In Mississippi, where the *quasi "common de vicinage"* prevails as in this state, the doctrine is thus announced: "Persons living contiguous to railroads have the same right as others, in more remote localities, to turn their cattle upon the range; but they assume the risk of their greater exposure to danger. The cattle are liable to go upon the road: the company cannot detain them damage feasant, any more than any other land-owner; nor can they treat them as unlawfully there, and therefore relax their care and efforts to avoid their destruction. The only justification of the company for injury to them is, that in the prosecution of their ordinary and lawful business, the act could not have been avoided by the use of such care, prudence, and skill, as a discreet man would put forth to prevent or avoid it." *R. R. Co.* v. *Field*, 46 Miss., 573.

If, therefore, the plaintiff turned his mule out of his enclosure, as he had the right to do, the act could in no sense be considered as contributory negligence, and it was error in the judge to charge the jury that "if you are satisfied by the evidence that the plain-

tiff, knowing the train would pass that point in a short time, turned his mule upon the track of the defendant and left it there, and this action of his contributed directly to the injury complained of, the plaintiff would be guilty of contributory negligence, and would not be entitled to recover." We presume what His Honor meant by *turning the mule upon the track*, was, the turning it out near the track, for there was no proof it was turned by plaintiff upon the track.

But conceding that negligence was imputable to the plaintiff in turning his mule out of his lot, as described by the witnesses, still it was the duty of the defendant to exercise proper care to avoid the injury; for it has been held by this court, that "notwithstanding the previous negligence of the plaintiff, if at any time when the injury was committed it might have been avoided by the exercise of reasonable care and prudence on the part of the defendant, an action will lie for damages." *Gunter* v. *Wicker*, 85 N. C., 310. The instruction asked by the plaintiff and refused by the court, was almost in the identical language of this decision, and when the court declined to give it, the jury may possibly have been misled by the inference, reasonably to be drawn by the refusal, that the court was of opinion the converse of the proposition was the law: in other words, that if the plaintiff contributed by his unlawful act to the injury, the defendant would be excused from the exercise of that reasonable care and prudence which the law, under other circumstances, requires at the hands of a railroad company and its servants.

In *Davies* v. *Mann*, 10 M. & W. (Exc.), 546, it is held that the general rule of law respecting negligence is, "that although there may have been negligence on the part of the plaintiff, yet, unless he might, by the exercise of ordinary care, have avoided the consequence of the defendant's negligence, he is entitled to recover. Therefore, where the defendant negligently drove his horses and wagon against, and killed an ass which had been left in the highway fettered in the forefeet, and thus unable to get out of the way of defendant's wagon, which was going at a

smartish pace along the road, it was held that the jury were properly directed that although it was an illegal act on the part of the plaintiff, so to put the animal in the highway, the plaintiff was entitled to recover."

Whether the act of the plaintiff in turning out his mule constituted contributory negligence, depends upon the question whether the act of the plaintiff was a proximate or a remote cause. If the act is directly connected, so as to be concurrent with that of the defendant, then his negligence is proximate and will bar his recovery; but where the negligent act of the plaintiff precedes in point of time that of the defendant, then it is held to be a remote cause of the injury and will not bar a recovery, if the injury could have been prevented by the exercise of reasonable care and prudence on the part of the defendant. Thompson on Negligence, 1157, note 8; *Gunter* v. *Wicker*, *supra; Doggett* v. *R. R. Co.*, 78 N. C., 305; *Roberts* v. *R. R. Co.*, *ante*, 560. Here, the act of turning out the mule, conceding it to have been unlawful, was not a proximate cause of the injury.

We do not mean to intimate an opinion as to the question whether the defendant had used the care and prudence required by the law to avoid the injury, but only that the plaintiff was entitled, as matter of law, to the instruction asked, and that the refusal to give it may have had an improper influence on the minds of the jury, and that there was error in the charge given.

Error. *Venire de novo.*

BRANCH & POPE v. WILMINGTON & WELDON RAILROAD COMPANY.

Railroads, liability for failure to receive and to ship freight.

1. A railroad company is liable in damages sustained by reason of a delay in the shipment of freight.

2. Where it refuses to *receive* freight tendered for transportation, an action for the penalty of fifty dollars, as provided by the act of 1879, ch. 182, may be brought.

3. Where the action is for the penalty for allowing freight when received to remain unshipped for more than five days, as provided by the act of 1874-'5, ch. 240, § 2; *Held*, the "five days" mean five full running days—exclusive of the day of delivery and the day of shipment.

(*Keeter* v. *Railroad Co.*, 86 N. C., 346, cited and approved).

CIVIL ACTION tried at Fall Term, 1882, of HALIFAX Superior Court, before *McKoy, J.*

The action was brought under the act of 1874–'75, ch. 240, § 2, to recover a penalty for the detention of one bale of cotton at the defendant's depot in Enfield, N. C., from the third day of November, 1881, to the 10th day of the same month.

The cotton was carried to the depot at Enfield and tendered to the agent of the company for shipment on the 3d day of November, 1881, but the agent declined to receive it and give bill of lading therefor until the next day. The cotton was thereupon left by the plaintiffs upon the platform provided by the company for receiving cotton at said depot, and on the next day of said month (November 4th, 1881), the agent received said cotton for shipment and gave plaintiffs a bill of lading which was accepted by them.

Upon this state of facts His Honor, being of opinion that the plaintiffs were not entitled to recover, gave judgment for the defendant, from which the plaintiffs appealed.

Messrs. Mullen & Moore, for plaintiffs.

Messrs. Gatling & Whitaker and *Day & Zollicoffer*, for defendant.

ASHE, J. The action cannot be sustained. The plaintiffs have mistaken their remedy. It was the duty of the defendant to ship the cotton when delivered, and their failure to do so gave the plaintiffs a right of action for such damages as they may have

sustained by reason of the delay; or they may have maintained an action under the act of 1879, ch. 182, which makes it the duty of all railroad companies to *receive* all freights tendered for transportation and forward them, under a penalty of fifty dollars upon failure to do so.

This action is brought under the act of 1874–'75, ch. 240, § 2, which makes it unlawful for any railroad company operating in this state to allow any freight it may receive for shipment *to remain unshipped for more than five days,* unless otherwise agreed between the railroad company and the shipper, under a penalty of twenty-five dollars for each day said freight remains unshipped. This act gives the penalty for allowing freight, when received, to remain unshipped for the time specified therein, and the act of 1879 gives it for not *receiving* freight, when tendered.

The act of 1874–'75 has been construed by this court in the late case of *Keeter* v. *R. R. Co.*, 86 N. C., 346, in which the case of *Branch* v. *R. R. Co.*, 77 N. C., 347, was cited with approval. In the former case the cotton was received for transportation on the 24th day of December, 1880, and was not shipped until the 30th of the same month; and it was held, upon the authority of the latter case, that the defendant company had not incurred the penalty prescribed by the statute, for that the words "five days" meant five full running days, exclusive of the day of delivery and the day of shipment—the law not taking notice of the fractions of a day.

Here, the cotton was *tendered* on the 3d day of November, but not *received* until the next day, the fourth, and was permitted to remain unshipped until the tenth of the same month. Excluding, then, the fourth and the tenth days from the computation, and there were just five days intervening, and for not shipping within these days there was no violation of the act.

There is no error. The judgment of the superior court is affirmed.

No error. Affirmed.

BRANCH & POPE v. WILMINGTON & WELDON RAILROAD COMPANY.

Transcript—Railroad—Agent and Principal—Evidence.

1. The transcript of a record on appeal must show the matters at issue in the case; they cannot be supplied by a reference to those in the record of another case.
2. The declarations of an agent in reference to acts not within the scope of his agency, are not admissible to affect the principal; *Therefore*, in an action against a railroad company for the penalty for delay in shipment of local freight, it was held error to admit the declarations of a station agent, to the effect that the company, during a certain season, used most of its cars in transporting through freight—his agency being unconnected with the through freight business.
3. The clause in a bill of lading that the goods will be shipped "at the convenience of the company," will not protect it from liability for an unreasonable delay.

(*Whitehead* v. *R. R. Co.*, 87 N. C., 255; *Smith* v. *R. R. Co.*, 68 N. C., 107, cited and approved).

CIVIL ACTION tried at Fall Term, 1882, of HALIFAX Superior Court, before *McKoy, J.*

The defendant appealed.

Messrs. Mullen & Moore, for plaintiffs.

Messrs. Gatling & Whitaker and *Day & Zollicoffer*, for defendant.

SMITH, C. J. The plaintiffs, on December 28, 1881, delivered to the defendant's agent at the depot of the company, in Enfield, twenty bales of lint cotton for transportation over its road and a connecting line, consigned to commission merchants in Norfolk, Virginia, and they remained in the defendant's warehouse until the 7th of January, 1882, before being sent off in the company's cars.

The bill of lading or receipt given to the plaintiffs, at the

time of the deposit with the agent, contains a clause that the cotton is received "for transportation at company's convenience," and this was accepted by the plaintiffs.

The action is to recover the penalty given by the act of 1874–'75, ch. 240, § 2, for allowing freight received for shipment to remain unshipped for more than five days, unless a contrary agreement be entered into, and the defence set up in the answer is, that "as soon as the defendant could provide the necessary cars, the said cotton was forwarded to the consignees, and that owing to the large amount of cotton and other freight delivered to the defendant for transportation at that season, it was impossible to ship the cotton at an earlier date."

The record states that all the issues, not setting them out, were found by the jury in favor of the plaintiffs, and this defect the counsel undertake to supply by a written agreement, signed by both, that the issues were the same as those in the record of the appeal in **Bell* v. *W. & W. Railroad Co.*, at this term, except as to the number of days in the third issue. We cannot recognize this method of amending the record, requiring the court to look into the transcript of another case to obtain the information necessary in deciding the appeal in this. That, counsel by consent are permitted to do, and then the record is itself corrected.

We must, therefore, consider the issues submitted to the jury to be such as arise upon, and are eliminated from the pleadings, and among them that raised in the concluding paragraph of the answer, alleging in excuse the inability of the defendant to provide cars for transportation sooner.

To combat the defence, resting upon a loose and imperfect statement of facts in explanation and excuse for the delay, one of the plaintiffs was examined on their behalf, and permitted,

*The judgment below in this case was affirmed upon the authority of *Whitehead* v. *Railroad Co.*, 87 N. C., 255. The appeal was taken before the decision in that case, and the appellant withdrew his exception.

after objection, to testify to a declaration made by the company's agent, after the goods had been forwarded, in which the agent said, "they were not shipped sooner than they were, because the company used most of its cars during that period (from December 28, 1881, to January 7, 1882) to transport through freight, which it preferred to local freight." It was shown, before the declaration was introduced, and in support of the objection to its admission, that the agent's authority extended to receiving and forwarding freight at that station; to the loading and unloading of cars; to the delivery of freight received, and collecting charges for transportation; and to conveying information to other agents of the company of the need of more cars. The agency was unconnected with through freight. To the reception of the proof of the agent's declarations the defendant excepted.

The substantial controversy between the parties, shown upon the pleadings, is as to matters of excuse sufficient, upon a fair and reasonable interpretation of the statute, to relieve the carrier company from the penalty imposed, as explained in the recent case of *Whitehead* v. *R. R. Co.*, 87 N. C., 255, and the evidence, if competent, was pertinent and material to the inquiry. That it was inadmissible, is expressly decided in *Smith* v. *R. R. Co.*, 68 N. C., 107, in which the rule is thus stated by RODMAN, J.: "What an agent says in the course of doing an act in the scope of his agency, characterizing or qualifying the act, is admissible as part of the *res gestæ*. *But if his right to act in the particular matter in question has ceased, his declarations are mere hearsay, which do not affect the principal.*

The clause in the receipt assenting to the conveyance of the goods at the convenience of the company, cannot be permitted to protect the company from liability for an unreasonable detention of the goods in their warehouse, nor from the forfeiture incurred thereby. It would be against public policy to allow common carriers to free themselves from this common law obli-

gation, by a stipulation that they should consult their own convenience about the time of carriage of goods entrusted to their custody for that purpose.

There is error, and there must be a *venire de novo.*

Error. *Venire de novo.*

S. H. ISLER v. S. W. ISLER, Executor.

Burnt Records—Evidence—Sale of absolute estate by life-tenant—Rights of Remainderman.

1. Under the act in reference to burnt or lost records, the recital of a record contained in a deed executed by virtue of court proceedings prior to 1865, is *prima facie* evidence of the existence and validity of the record; and the deed, of the decree upon which it purports to be founded. Bat. Rev., ch. 14.
2. Where one holding only a life estate in property sells the absolute interest, the remainderman has an equity to have the price received, with interest from the death of the life-tenant.
3. The money paid for a slave sold by a life-tenant takes the place of the property, and the remainderman is entitled to the same, at the death of such tenant, if he elect to ratify the sale. There is no distinction in principle between the destruction of such property by death or by emancipation.

(*McKeil* v. *Cutlar*, 4 Jones' Eq., 381; *Lee* v. *McBride*, 6 Ired. Eq., 533; *Lewis* v. *Kemp*, 3 Ired. Eq., 233; *Lewis* v. *Mobley*, 4 Dev. & Bat., 323; *Haughton* v. *Benbury*, 2 Jones' Eq., 337; *Jones* v. *Baird*, 7 Jones, 152; *Cheshire* v. *Cheshire*, 2 Ired. Eq., 569, cited, commented on and approved).

CIVIL ACTION tried at February Special Term, 1882, of WAYNE Superior Court, before *Avery, J.*

The plaintiff brought this action to recover his share of certain property alleged to have been sold by the defendant's testatrix, under the circumstances set out in the opinion. The defendant appealed from the judgment.

Messrs. Faircloth & Allen, for plaintiff.
Messrs. Battle & Mordecai, for defendant.

RUFFIN, J. This court can perceive no error in any of the rulings made in this cause in the court below, or in the judgment that was there rendered in behalf of the plaintiff.

As made by the pleadings, the proofs, and the verdict of the jury, the case is as follows:

Simmons Isler, senior, died in 1839, leaving a last will in which, after making certain specific legacies, he devised and bequeathed all the residue of his estate of every kind to his widow, Barbara M., for life, with remainder to such of his children as should marry or arrive at full age, to be equally divided among them. He had four children, two of whom died childless and unmarried in the life-time of their mother, leaving the plaintiff and the defendant as the only persons to take the property so given in remainder. Amongst the property thus disposed of was a tract of land situate in Brunswick county, and two slaves, London and Claiborne.

In 1851, upon a petition filed by the said Barbara M., in her own name and those of her children, then infants, by herself as their next friend and guardian, the said tract of land was sold under a decree of the court of equity of said county of Brunswick, when one Bryan became the purchaser at the price of $2,500, and, upon confirmation of the sale and the payment of the purchase money, took a deed from the master conveying the land to him in fee. The whole of this purchase money was paid to the said Barbara M., who kept the same and used it as her own.

In 1840, the said Barbara M. sold the slave, London, at the price of $1,000, which money she also received and kept as if her own—the sale being an absolute one and not confined to her own life interest, and being to a speculator, upon a distinct understanding that he was to be carried out of the state.

In 1851, she sold the slave, Claiborne, at the price of $600, which sum she received and used as the other—this sale being

an absolute one also, and followed by the disappearance of the slave from that part of the country.

In 1879, the said Barbara M. died, leaving a will in which she gave much the greater part of her estate to the defendant, whom she also appointed her executor, in which capacity he is now sued.

The first exception taken was to the admission of certain testimony. After having shown that in 1865 the records of the court of equity for Brunswick county had been destroyed by the federal troops, who then occupied the town (Smithville), and who wantonly took them from the files and scattered them upon the streets, the plaintiff offered in evidence the deed which was made to the purchaser, Bryan, by the master, for the land in question, it being his object to show by its recitals, that the land was in fact sold under a decree of the court, in a proceeding instituted in the names of the said Barbara M. and her infant children, she representing the latter as their guardian or next friend. This was objected to by the defendant, but admitted by the court, and we think properly so. The deed bears date in December, 1851, and the case, therefore, falls distinctly under the act of 1871–'72, which provides that a recital of a record of any court, the records of which may have been destroyed, contained in any deed executed prior to 1865, by any officer or commissioner authorized by law to execute the same, shall be deemed *prima facie* evidence of the existence and validity of the record referred to, and shall to all intents be valid against persons mentioned in the deed as being parties to the record, and all others claiming under them, and that said deed shall be admitted as *prima facie* evidence of the existence and validity of the decree or record upon which it purports to be founded. Bat. Rev. ch. 14, §§ 19 and 20.

The second exception was, that the court declined to instruct the jury that there was no evidence that the defendant's testatrix ever received any money from the clerk and master, as the proceeds of the land sold under the decree.

The complaint in terms alleges that she did receive the sum of $2,500 from that officer, and that the same arose from the sale of the Brunswick land sold by the order of the court, and this, if not admitted in the answer, is certainly not denied, and, therefore, the instruction asked for could not properly have been given.

Third. The defendant insisted, and requested the court so to charge, that inasmuch as a presumption of the death of the two slaves, London and Claiborne, had arisen, or in case of their being alive, their emancipation had occurred before the death of the life-tenant, the plaintiff was not entitled to recover of her estate.

Scarcely any question seems ever to have perplexed the court so much, as that which had reference to the manner of granting relief, and the extent to which it should be granted, to one who had a vested remainder in a slave dependent upon a life-estate, in case he should be sold by the tenant-for-life. It is impossible to reconcile the various decisions bearing upon the question; nor is it necessary that we should attempt it, for they all concur in saying that in such a case he in remainder is entitled to some relief, provided the sale be fraudulently made; and according to what seems to be the weight of authority, an absolute sale of the whole interest is of itself evidence of fraud.

In *McKeil* v. *Cutlar*, 4 Jones' Eq., 381, it is held to be clearly against conscience for one holding only a life-estate to sell the absolute interest, and if done, that the remainderman had a plain equity to have the price received, with interest from the death of the life-tenant; and in *Lee* v. *McBride*, 6 Ired. Eq., 533, a sale of the whole interest in such a case is put upon the same footing with the act of sending the slave abroad, with an intent to baffle the remainderman in search for him.

Again, the court say, in *Lewis* v. *Kemp*, 3 Ired. Eq., 243, that it is an act of bad faith for a life-tenant, either to sell the whole interest in the slave, or to sell him for the purpose of his being carried out of the state—and this appears to us to be the only sensible rule, since the same kind of inconvenience and danger to

the remainderman, if not the same in degree, is as likely to result from the one act as the other.

Some uncertainty, too, has been thrown upon the right of the remainderman to have the price paid for the slave, in case he should die after the sale and before the death of the life-tenant.

In the case last cited, as well as in *Lewis* v. *Mobley*, 4 Dev. & Bat., 323, it was held that if the slave should die during the continuance of the life-estate, the remainderman could have no claim upon the estate of the tenant-for-life for the price for which he had been sold, and it was also declared that if unheard of for more than seven years, the courts would presume him to be dead. Yet in *Haughton* v. *Benbury*, 2 Jones' Eq., 337, the court declared, without any reservation, that although a slave, who had been sold with intent to defraud one owning him in remainder, had died during the pendency of the life-estate, still the remainderman might, at his election, ratify the sale, and thus entitle him to some portion of the purchase money, and a rule was laid down for its apportionment between him and the estate of the life-tenant, differing from that suggested in any other case.

And again in *Jones* v. *Baird*, 7 Jones, 152, the last case touching the point, a very grave doubt is expressed, whether the doctrine of the presumption of death, arising from the fact that the party had not been heard from for seven years, could under any circumstances be applied to slaves.

Seeing the authorities to be thus uncertain and in some instances contradictory, the court feel at liberty to adopt their own rule with regard to the matter, and to them none seems so simple or just as the one laid down in *McKeil* v. *Cutlar*, *supra*, which was also recognized in *Cheshire* v. *Cheshire*, 2 Ired. Eq., 569, allowing the price paid to represent the slave and to be enjoyed by the life-tenant during the residue of his life, and then to go without abatement to him in remainder, provided he shall elect to ratify the sale and take the fund.

By such a ratification the title of the purchaser is made good from the date of his purchase, and, if the slave sold had been a

female, would have entitled him to all of the children born of her body, and who might have survived her. Why, then, should not the money completely take the place of the property, and go just as the latter was intended to go?

It was upon this principle that His Honor below seems to have rested his decision, and in so doing he committed no error. There can be no distinction in principle between the destruction of the property by death or by emancipation.

The judgment of the court below is therefore affirmed.

No error. Affirmed.

S. H. ISLER v. S. W. ISLER, Executor.

Wills—Doctrine of Election.

Where a testator expresses a manifest purpose of disposing of property of another, to whom the testator devises property of his own, it is immaterial whether he believed he had title and the right to will it; or, where the testator, having an undivided interest in the property, devises it specifically; in either case, the devisee or co-owner must elect between his interest in the same and any other interest he may take under the will.

CIVIL ACTION tried at February Special Term, 1882, of WAYNE Superior Court, before *Avery, J.*

The defendant appealed from the judgment below.

Messrs. Faircloth & Allen, for plaintiff.

Messrs. Battle & Mordecai, for defendant.

RUFFIN, J. The court thinks that the equitable doctrine of election has a direct application to this case and must govern it.

The facts are these: Simmons Isler, Senr., died in 1839, leav-

ing a last will in which he devised and bequeathed the principal part of his estate to his widow, Barbara M., for life, with remainder to her four sons, the plaintiff and the defendant, and their two brothers, George M. and William R. The two last named died in the life-time of their mother, unmarried and without children, so that the whole estate in the remainder created by the will is vested in the parties to this action.

Amongst the things thus given to the widow for life, were two slaves, Harriet and Allen, which she afterwards sold absolutely to one Kornegay, at the price of two thousand dollars in cash. This sum, together with a thousand dollars of her own money, she used in purchasing a house and lot in the town of Goldsboro, from one L. W. Humphrey, and took a deed therefor in fee in her own name and right. She died in 1879, leaving a will in which she devised the lot so purchased to the defendant, describing it specifically as the lot purchased from Humphrey. In another clause of the same will, she devised to the plaintiff another house and lot in the same town, and also bequeathed to him the sum of one thousand dollars in money.

In his complaint, the plaintiff insists upon his right to follow the fund arising from the sale of the two slaves into the house devised to the defendant, and asks that the latter may be declared a trustee to his use and benefit to the extent of his interest in the fund, and may be directed to convey to him his proportionate part of the lot in question.

These facts present simply the case, which is always adduced for the purpose of illustrating the doctrine of election (whenever that subject is discussed) of a testator disposing of the property of another, and at the same time and by the same will giving to that other, property of his own, in which case, according to all the authorities, the party is put to choose between taking, either under the will or against it, and will not be permitted to enjoy both benefits.

The general doctrine was conceded by counsel, but its application to this case was denied upon the ground that it did not appear upon the face of the will that the testatrix knew of the

plaintiff's claim in the matter, or that she certainly intended to dispose of what was not her own. It is true there is a *prima facie* presumption, always, that a testator means only to dispose of what is his own, and what he has a right to give; and if it be at all doubtful, by the terms of his will, whether he had in fact a purpose to dispose of property really belonging to another, that doubt will govern the courts, so that the true owner, even though he should derive other benefits under the will, will not be driven to make an election. But if on the other hand there should be a manifest purpose expressed in the will to dispose of the thing itself, then it is wholly immaterial whether he should recognize it, or not, as belonging to another, or whether he should believe that the title and the right to dispose of it rested in himself or not.

In speaking of this very point, and in reply to a suggestion that a testator might have made a different disposition if he had been aware of the true state of the title, LORD ELDON declared in *Thelluson* v. *Woodford*, 13 Ves., 221, that the law was too plain, that no man should claim any benefit under a will without conforming and giving effect to every other provision contained therein, as far as lay in his power, and that the question, whether the testator believed he had title to the property and the right to dispose of it, had nothing to do with the case; that the only question was, did he intend the property mentioned to go in the manner indicated, and not whether he had power so to direct it, or would have done so, if he had known that he thereby imposed a condition upon another; and he added, that nothing could be more dangerous than to speculate upon what a testator would or would not have done, if he had known one thing or another.

Again it is said, that according to the facts stated, the testatrix had a third interest in the house and lot, having expended that much of her own money in its purchase, and it is insisted that under such circumstances she will not be presumed to have intended to give more than she had a right to. This, too, is a question of construction for the court, and the case of *Padbury* v. *Clark*, 2 Mac. and G., 298, seems to be directly in point, and

to lay down the rule correctly. There, it was held that when a man who had an undivided moiety in a house devised it by a particular description, such as "my messuage or tenement with the garden thereunto belonging," the whole was intended to pass.

In *Miller* v. *Thurgood*, 33 Beav., 496, it is said there are many cases on the subject, but they all resolve themselves into this: "If a testator having an undivided interest in a particular property devises the same specifically, a case of election will arise and the co-owner must elect between his interest in the property and any other interest he may take under the will; and what was said in *Wilkinson* v. *Dent*, 6 L. Rep., is to the same effect.

In the will now under consideration, the testatrix not only describes the lot devised as that which she had purchased from its former owner, Humphrey, but specifically designates it by its number in the plan of the town; so that it is impossible to satisfy the terms of its description without supposing that she intended to pass the lot as an entirety.

In the opinion of this court, the plaintiff fails to set forth in his complaint facts sufficient to constitute a cause of action against the defendant, and, therefore, the judgment rendered in his behalf in the court below is reversed, and judgment will be entered here dismissing the action.

Error. Judgment accordingly.

JOHN LONDON, Adm'r, v. WILMINGTON & WELDON RAILROAD COMPANY.

Wills, probate of, conclusive.

1. The probate of a will in common form and the grant of letters testamentary by the probate court, is conclusive as to the fact that there is a will

and an executor thereof, so long as the adjudication of probate stands unreversed: it cannot be collaterally impeached in another court. (Cases in which the probate court acts without jurisdiction of the particular case, reviewed by SMITH, C. J.).

2. Whether the letters be void or voidable, a *bona fide* payment of a debt due to the estate will be a discharge to the debtor.

(*Granberry* v. *Mhoon*, 1 Dev., 456; *Ro. Nav. Co.* v. *Green*, 3 Dev., 434; *Barwick* v. *Wood*, 3 Jones, 306; *Collins* v. *Turner*, Term Rep., 105; *Johnson* v. *Corpening*, 4 Ired. Eq., 216; *Springs* v. *Erwin*, 6 Ired., 27; *State* v. *White*, 7 Ired., 116; *Smith* v. *Munroe*, 1 Ired., 345; *State* v. *Washburn*, 3 Ired., 557; *Hyman* v. *Gaskins*, 5 Ired., 267; *State* v. *Shirley*, 1 Ired., 597; *State* v. *Pool*, 5 Ired., 105, cited, commented on and approved).

CIVIL ACTION tried at Fall Term, 1882, of NEW HANOVER Superior Court, before *MacRae, J.*

Upon the death of Eli W. Hall in the year 1865, several scripts purporting to contain his will, with certain successive codicils, all without date and all duly attested, except the last, in which he designated Edward D. Hall and John Dawson executors, were offered by them for probate in the county court of New Hanover, the residence of the deceased, and, upon the evidence of one of the subscribing witnesses to the original instrument and of another to the last attested codicil, which revokes all preceding it, were declared and adjudged to be the "last will and testament of the said Eli W. Hall."

The deceased at his death owned eighteen shares of the capital stock of the defendant corporation, which the said Edward, acting as executor, caused to be transferred; to-wit, sixteen shares on November 28, 1868, and the other two in May, 1872, to different purchasers to whom the same had been sold. The tranfer was affected, under the charter and according to the by-laws of the company, by the surrender of the first certificate of stock and the issue of new to the assignee, and the making the proper entries of the transfer upon its books.

In the month of April, 1881, John London, the plaintiff, produced before the probate judge the last attested and repealing script of those declared to constitute the will of the testator,

and, under regular proceedings for an *ex-parte* probate, the same was adjudged, upon the testimony of T. D. Haigh, a subscribing witness thereto, proving its execution in due form of law, to be "the last will and testament" of the said testator, and sufficient in law to pass his real and personal estate. Thereupon, letters of administration, with the will annexed, were issued to the plaintiff.

The present action was commenced on May 13, 1881, to compel the defendant to issue to the plaintiff, as administrator, a certificate for 18 shares of the stock, alleged to have been thus wrongfully and without legal authority transferred to others, and to account for all dividends and profits thereon declared and paid since the testator's death; or, if disabled by its charter from making a further increase of its capital stock, to pay over to the plaintiff the value of the stock and accruing profits or interest thereon.

The defendant insists that the transfer of the stock was rightfully made under the direction and authority of Edward D. Hall, to whom, and his associate, letters testamentary had been duly and regularly issued by a court of competent jurisdiction, and that it is not in any way responsible to the plaintiff's demand.

The court held that the defendant was protected, in transferring the stock, by the adjudication in the county court and the award of letters testamentary, and that the action could not be maintained. Judgment was accordingly rendered against the plaintiff for costs, and he appeals.

Messrs. MacRae & Strange, for plaintiff.
Messrs. George Davis and *Stedman & Latimer*, for defendant.

SMITH, C. J., after stating the above. The only question arising upon the appeal is whether the granting of the letters testamentary is void, so as to afford no sanction to the defendant's act in transferring the stock, and to leave the company exposed

to the action of the party to whom the letters of administration have since been granted, without any direct revocation of the former adjudication upon the same instrument.

The argument on either side of the proposition has been full and exhaustive, and, with the numerous references to decided cases and the works of elementary writers, has greatly aided us in arriving at a satisfactory conclusion.

The general rule is well settled that the judgment of the probate court, in which is vested exclusive jurisdiction to pass on wills of personalty (and in this state by statute of realty also) and grant letters testamentary or of administration, is conclusive of the right determined, and is not exposed to impeachment collaterally in another court where the effect of the action is to be considered.

A probate in common form, unrevoked, is conclusive in courts of law and equity as to the appointment of an executor and the validity and contents of a will; and it is not allowable in an action to show that another was appointed executor. This is the principle announced in the elementary books. Williams' Ex'rs, 339; Toller, 76.

"The probate," says BULLER, J., "is conclusive till it be repealed, and no court of common law can admit evidence to impeach it"; and, referring to the analogy attempted to be drawn from the case of a grant of letters of administration upon the estate of a living person supposed to be dead, he adds, "that in such case the ecclesiastical court has no jurisdiction, and the probate can have no effect. The distinction in this respect is this: if they, the courts, have jurisdiction, their sentence, so long as it stands unrepealed, shall avail in all other places; but where they have no jurisdiction, their whole proceedings are a nullity." *Allen* v. *Dundass*, 3 D. & E., 125.

"Whether there is a will, and who is the executor thereof," is the remark of HENDERSON, J., "are matters of ecclesiastical cognizance, and consequently the decision of the ecclesiastical courts on the subject is conclusive. They adjudicate that this

is the will of A, and that B is the executor thereof, and when in other courts it is necessary that B should sustain the character of executor, *that adjudication is conclusive"*; and he adds, that the letters testamentary are a testimonial given by the court that the party has been adjudged to be executor, and further, that it is needless to append a copy of the will, as it can answer no purpose. *Granberry* v. *Mhoon*, 1 Dev., 456. The principle is affirmed by the same judge in *Ro. Nav. Co.* v. *Green*, 3 Dev., 434.

To the same effect is the language of PEARSON, J., in commenting on the difference between an *ex-parte* probate of a deed for registration and of a will. "It would seem," he says, "that where a court has exclusive jurisdiction and a case is properly constituted before it, its action must be conclusive until reversed. It is otherwise where there is a want of jurisdiction; or where it appears on the face of the proceeding that the case was not properly constituted before it, as if process was not served on the party whose rights are to be affected by the judgment or decree." *Barwick* v. *Wood*, 3 Jones, 306.

The general principle being established, the next inquiry is as to the cases in which the probate court acts without possessing jurisdiction in the particular case; and the numerous adjudications of this court are entirely in harmony with the rule laid down by reliable text writers.

It is an unwarranted assumption of jurisdiction when the probate court grants letters in a county in which the decedent (though a resident of the state) did not there have his domicil. *Collins* v. *Turner*, N. C. Term Rep., 105; *Johnson* v. *Corpening*, 4 Ired. Eq., 216:

Or, if a non-resident, in a county in which he had no effects or *bona notabilia*—*Smith* v. *Munroe*, 1 Ired., 345:

Or, where an administration *cum testamento annexo* is granted, and there is an executor appointed in the will who has not renounced—*Springs* v. *Erwin*, 6 Ired., 27:

Or, upon the estate of a living person supposed to be dead—*State* v. *White*, 7 Ired., 116:

Or, general letters, where there is a pending contest about the probate of the will—*State* v. *Washburn*, 3 Ired., 557.

If the person, on whose estate the court undertakes to grant letters testamentary or of administration, be dead and at the time of his decease have his domicil or have *bona notabilia* to be administered, the jurisdiction exists, and "it matters not how irregular may be the proceedings of the court, or how absurd and incomprehensible its conclusions, they afford sufficient authority to cover the *bona fide* transactions of its appointees. 2 Red. on Wills, ch. 4, § 15, par. 3, note.

The facts of the present case meet the test and conditions of the prescribed rule. The deceased at his death was domiciled and had his residence in New Hanover county, over which the county court exercised exclusive original jurisdiction—papers, testamentary in their character, and most of them authenticated by the necessary subscribing witnesses, were produced before the court, and all adjudged to be the will of the deceased, including the script, whose sole office was the nomination of executors—and letters testamentary accordingly issued to the nominees.

The only alleged error in the adjudication was the admission to probate of a revoked script and the unattested *addendum* which appoints the executors; and this error is clearly one not to be corrected in a common law court, or assailed in a common law proceeding. It is enough to say that a tribunal of competent general jurisdiction, and possessing special jurisdiction to decide, has determined the script to be and constitute the will of the deceased, and that the persons nominated are the executors thereof.

Many of the references in the appellant's argument are *ex-parte probates* of deed, the distinction between which and the judicial determination in the probate of wills, is so obvious and plain as to admit of no analogy between them.

But if the defective probate renders the action of the court

void instead of voidable, it by no means follows that the surrender of the stock to the executors for their disposal, made in good faith, which is not drawn in question, subjects them to a second accountability to the plaintiff. It would be a harsh and rigorous rule to be allowed this operation upon an innocent debtor or holder of property of the decedent.

Referring to a void grant of administration and the pursuit and recovery of property by the rightful executor from the person to whom the administrator had sold it, NASH, J., observes: "With respect to payment, however made to an executor, or administrator, by a debtor of the estate, the rule is different. If the grant be made by a court of competent jurisdiction, *whether the letters be void or only voidable, a bona fide payment of a debt due to the estate will be a discharge to the debtor.* In *Allen* v. *Dundass*, 3 Term, 125, it was held that a payment made to the executor of a forged will, who had obtained probate of it, the supposed testator being dead, was a valid discharge to the debtor, although the probate was afterwards declared void by the ecclesiastical court," on the principle, "that if the executor had brought suit against the debtor, the latter could not have controverted *the title of the executor so long as the probate was unrepealed*, and the debtor was not obliged to wait for a suit, when he knew no defence could be made to it." *Hyman* v. *Gaskins*, 5 Ired., 267.

In *Jochumsen* v. *Bank*, 3 Allen (Mass.), 87, cited by the appellee, it is expressly held that a grant of administration upon the estate of a living man, from long absence presumed to be dead, was an absolute nullity, and he could reclaim and recover his own funds from the debtor who had paid them over to the appointee; and so it has been decided that a bond given by an administrator, under the same circumstances, to secure the discharge of the imposed trust and payable to the state, could not be made available to the next of kin suing on it, as relators, for their distributive shares. These decisions may be supported upon the ground of a total want of jurisdiction to act, but are not precedents for the contention that an erroneous or irregular adjudica-

tion of a probate court, rightfully taking cognizance of the cause, affords no defence to such as, in good faith relying upon it, account for funds of the deceased and pay over to the judicially accredited representative of the estate.

The decision in *State* v. *White, supra,* rests mainly upon the want of power in the court to accept a bond from the administrator, appointed upon the estate of a living person, made payable to the state, because it could only be delivered when death had occurred—in this particular following the ruling in *State* v. *Shirley*, 1 Ired., 597, which was afterwards corrected by statute (Bat. Rev., ch. 80, § 16). *State* v. *Pool*, 5 Ired., 105.

The force ascribed to the unreversed adjudication of probate finds some support in the enactment of the general assembly on the subject:

Thus, if after letters of administration or testamentary issue, a will, or, in the latter case, a later one is found and proved, the judge revoking the letters first issued is required to give written notice to the person to whom the first letters issued, previous to the service of which notice, "the acts of such person, done in good faith, are valid." Bat. Rev., ch. 119, § 35. And again, it is expressly declared, in section 39, that no will shall be effectual to pass real or personal estate, unless it shall have been duly proved and allowed in the probate court; and that when so proved, it "shall be conclusive as to the execution thereof against the heirs and devisees of the testator, whenever the probate thereof, under the like circumstances, would be conclusive against the next of kin and legatees of the testator."

Confidence in the integrity of judicial proceedings, when a case is properly constituted in court, and the court has jurisdiction, should not be shaken, unless to avert very disastrous consequences and in a plain case. Where would there be safety for a debtor when paying his debt to one declared and adjudged to have authority to receive it, if he is required to examine the records, and revise and decide upon the correctness of the adjudication, at the peril of being made responsible a second time, if he should err in opinion

upon such examination? "I have no authority," remarked Lord ELDON, passing upon an injunction and receiver, "to say that an instrument, of which the ecclesiastical court has granted probate, is not a will. * * * I do not know on what ground the ecclesiastical court has granted probate. It is enough for me, that, having granted probate, I am concluded from examining the question whether there is a will or not, *or whether Dr. Curling is executor or not. Thornton* v. *Curling*, 8 Sim., 310; 2 Red. Wills, ch. 1, § 5, par. 5.

Without ascertaining how the law may have been declared elsewhere, we feel bound by the well understood rules, accepted and acted upon in this state, sustained by sound reasoning and most conducive to the interests of all; and, accordingly, we hold that the act of the defendant was lawful, and exonerated it from further liability for the stock to the present plaintiff.

It must be declared there is no error, and the judgment rendered below is affirmed.

No error. Affirmed.

F. A. HAMPTON v. W. J. HARDIN.

Wills, probate of—Devisee competent to prove holograph—Witness—Section 343.

1. The probate of a will is conclusive until revoked by a direct proceeding in the probate court for that purpose; and a certified copy thereof is competent evidence under Bat. Rev., ch. 119, § 40.
2. A devisee under a holograph will is a competent witness to prove the will. The disqualification of interest is removed by the act of 1866, and section 10, chapter 119 of Battle's Revisal, applies only to wills that have attesting witnesses, and to the attesting witness.
3. The ruling in *Mason* v. *McCormick*, 80 N. C., 244, in reference to incompetency under section 343 of the Code, in case the witness ever had an interest in the event of the action, approved.

4. Where a witness is ruled out as incompetent, it is not necessary to set out what it was expected to prove; but if the objection be to his competency to testify to certain definite matters, what he proposes to testify must appear, that the court may pass upon it.

(*Mason* v. *McCormick*, 80 N. C., 244; *Smith* v. *Brittain*, 3 Ired. Eq., 347; *McCanless* v. *Reynolds*, 74 N. C., 301, cited and approved).

EJECTMENT tried at Fall Term, 1882, of RUTHERFORD Superior Court, before *Graves, J.*

Judgment for plaintiff, appeal by defendant.

Messrs. M. H. Justice and *W. J. Montgomery*, for plaintiff.
Mr. R. McBrayer, for defendant.

SMITH, C. J. The action is to recover a small strip of land in possession of the defendant, and the title thereto is dependent upon the true location of the dividing line between their respective tracts.

In tracing the title from one J. J. Hampton, who formerly owned both tracts, the plaintiff offered in evidence a certified copy of his will, which, as a holographic will, had been admitted to probate in the proper court upon the proofs required by statute (Bat. Rev., ch. 119, § 13), and it appeared upon the certificate of probate that the proper custody of the paper was shown by the examination of the plaintiff.

The admission of the evidence was opposed by the defendant upon the ground that the plaintiff, being a devisee, was an incompetent witness, and the probate was void. The objection was overruled and the evidence held to be admissible.

The defendant again objected, that upon such probate the devise to the plaintiff became inoperative and passed no estate in the land to her. This objection was also overruled.

The defendant, in support of his claim to the land in dispute and to show that it was within his boundary, proposed to prove by one G. W. Webb, declarations made by the said J. J. Hamp-

ton while owning and in possession of the plaintiff's land, as to the location of the disputed line. To this testimony the plaintiff objected, and to sustain his objection (based on section 343 of the Code), it was shown that Hampton conveyed the land claimed by the defendant to one James Webb, who at his death devised the same to his children, the witness G. W. Webb being one of them; that the land thus held in common was, on proceedings instituted by the devisees for partition, sold under a decree of the court and conveyed by its order to one Wiggins, the purchaser, and by the latter afterwards to the defendant. The testimony was rejected.

The exceptions to these several rulings constitute the case for consideration on the appeal.

1. We have had occasion in *London* v. *R. R. Co.*, *ante*, 584, to examine and determine the effect of an unrevoked adjudication establishing a testamentary paper as evidence when offered in another cause, and its conclusiveness until modified or recalled by a direct proceeding in the court which adjudged the probate, and it would be superfluous to discuss the subject again. In that case, the controversy was in regard to the validity of an act of an executor, declared to be such, and to whom and his associate letters testamentary had been duly issued. But the probate of wills and testaments are by statute put upon the same footing, and it is enacted that no will shall be effectual to pass any estate until it shall have been duly proved and allowed in the probate court, and that "the probate of a will devising real estate shall be *conclusive as to the execution thereof* against the heirs and devisees of the testator, whenever the probate thereof under the like circumstances would be conclusive against the next of kin and legatees of the testator" (Bat. Rev., ch. 119, § 39), and copies of wills, thus proved and duly certified, are made competent in any proceeding wherein the contents of the will would be competent evidence, *Ibid*, § 40. The court, therefore, ruled properly in regard to the admission of the copy of the will.

2. The objection again made to the reading of the will, but which we understand to be directed to the legal efficacy of the clause devising the land to the plaintiff, rests upon that provision of the statute which declares void any beneficial devise, estate, interest, legacy, or appointment of or affecting any real or personal estate given or made to an attesting witness, or the husband or wife of such, while the witness is still competent to prove the execution of the will, or its validity or invalidity. *Ibid*, § 10.

This enactment, a literal copy of the act, I VICTORIA, ch. 26, § 15, in its operative words, applies only to wills that have attesting witnesses. It does not include other witnesses whose testimony may be used in proving the writing as a testamentary paper, or its execution by the testator. Subscribing witnesses bear a relation to the instrument they attest, which none others have. They are the witnesses of the law; they must be called to sustain the instrument; others to testify to the same fact, though within their personal knowledge, will not answer. They are called on to see the due execution of the instrument; to observe the capacity and volition of the testator; and proof of their handwriting in some cases is proof of all these essential conditions to the validity of the testamentary act. It was to remove all improper influences and secure impartiality, in such as are called to attest the execution of the will, that all gifts to them or to their husbands or wives are annulled, and all temptations to swerve from the truth are taken away.

But the disqualification of interest is removed by the act of 1866, and the devisee is rendered competent to testify as any other person, the interest in the result affecting only the credit to be given to the testimony.

3. The remaining exception is to the exclusion of the declarations of J. J. Hampton, to prove which the said G. W. Webb was offered as a witness.

The effect of the proposed evidence, if favorable to the defendant, must have been to contract the boundary of the plaintiff's

land and correspondingly enlarge the boundary of the defendant's land by locating the line that divides them. The declarations may not be objectionable, as they are in disparagement of the claims of the owner then making them, if proved by a competent witness who heard them spoken. But the witness by whom they were to be proved was himself at one time a tenant in common with others of the tract whose limits are to be extended, or, while disputed, to be fixed by the proposed evidence. If he had retained his title, he would have an immediate and direct interest in the result of the action, and the disqualification attaches and remains when the estate or interest of the witness has passed out of him by assignment. The witness, therefore, seems to be within the inhibitory clause of section 343 of the Code. *Mason* v. *McCormick*, 80 N. C., 244.

Nor does it make any difference that the transfer of the estate of the witness was effected by means of a sale for partition under a decree of the court, for this is but a mode of conveyance by the tenants themselves, and stands upon no more favorable basis than a sale by the sheriff under execution. *Smith* v. *Brittain*, 3 Ired. Eq., 347; *McCanless* v. *Reynolds*, 74 N. C., 301.

It is not disclosed in the case what was the excluded declaration, and whether it tended to push the dividing line further within the boundaries claimed by the plaintiff, and thus embrace the disputed territory within the defendant's deed, so that the exclusion of the evidence, if admissible, can be seen to be prejudical to the defendant.

When a witness is ruled out as incompetent to testify at all, it is not necessary to set out what it was expected to prove; for the error in such case lies in the rejection of a competent witness. But if the objection be to his competency to testify to certain definite matters, it ought to appear what the witness proposed to testify, in order that the court may determine whether they are such as the law forbids him to speak of or are not. The only statement in the case is that the declarations were as

to the location of the line in dispute. Assuming, however, that the character of the refused declarations sufficiently appears, it also appears that the witness, as a former owner and assignor, is disabled from speaking of them.

It must be declared that there is no error, and the judgment is affirmed.

No error. Affirmed.

W. H. HOWERTON and others v. W. F. HENDERSON.

Wills, ellipsis supplied.

To carry out the general intention of the testator, the court supply an omitted word in the following clause of the will: "In case it should be more convenient to my beloved wife to have [sold] the land and even the negroes, the latter I suppose she ought to keep, as she will have two-thirds during widowhood and one-third in fee, she is at liberty to do so, as she will have ample money to purchase elsewhere."

(*Lassiter* v. *Wood*, 63 N. C., 360; *Macon* v. *Macon*, 75 N. C., 376; *Sessoms* v. *Sessoms*, 2 Dev. & Bat. Eq., 453; *Harrison* v. *Bowe*, 3 Jones Eq., 478; *Purnell* v. *Dudley*, 4 Jones Eq., 203; *Tayloe* v. *Johnson*, 63 N. C., 381; *Hill* v. *Toms*, 87 N. C., 492, cited and approved).

EJECTMENT tried at Fall Term, 1881, of GRANVILLE Superior Court, before *Gudger, J.*

Judgment in favor of plaintiffs, from which the defendant appealed.

Messrs. Hinsdale & Devereux and *A. M. Lewis*, for plaintiffs.
Messrs. Merrimon & Fuller, for defendant.

SMITH, C. J. The sole question involved in this controversy arises upon the construction of the devises in the will of James

Vaughn to his surviving wife, Ann, under whom the plaintiffs derive title and claim an estate in fee in the house and lot sought to be recovered in their action.

The will of the testator bears date early in January, 1816, and we suppose his death occurred soon thereafter, though the fact is not stated nor the time of proving the will given.

The first clause gives to his wife, during her widowhood, the "whole estate, real and personal," in manner and form to be thereafter stated, with some exceptions also to be mentioned; while the second devises and bequeathes to her one-third part of the entire estate, with carriage and horses and some minor articles of household furniture, "to her and to her heirs forever."

The testator then in several successive clauses gives certain named slaves to two nephews and nieces, to be delivered to them, and to another nephew and other nieces sums of money to be paid to them, at the death of his wife. To a sister he bequeathed an annuity, commencing at his own decease and to be paid to her quarterly in equal parts.

The testator then suggests, without giving positive directions, the expediency of making sale of certain real estate described as the "Eagle Tavern" lot and a tract of 132½ acres lying on Little Island creek, and enumerated articles of personal property, not including such as have already been disposed of, and excepting what he terms "tavern articles," or articles, as we understand, necessary to the business of a public house, and this he declares can only be carried out with the consent of Samuel Dickens, his partner, and nominated executor, to a dissolution of the partnership between them before the time fixed for its termination in the contract. In this confused clause, the testator in express terms recognizes the essential and predominant feature in the instrument, found in the two first clauses, by declaring that, if sold, one-third of the net proceeds of sale his "wife will be entitled to as soon as collected," and in case no sale is made, that she "will be entitled to one-third of the net rent."

The next clause, proceeding upon the supposition of a sale

under the preceding, enumerates as the property remaining to be divided, "my negroes, my Nut Bush land and the manor house and lot on which I live," and proceeds to direct the substitution of other slaves in place of those bequeathed to his first-mentioned nephew, if he fails to get those given him, or an equivalent in money to be paid instead.

Then follows the clause, which gives rise to the controversy, in these words:

"In case it should be more convenient to my beloved wife to have the Nut-bush land and my manor house and lot, and even the negroes, the latter I suppose she ought to keep, as she will have two-thirds during widowhood, and one-third in fee, she is at liberty to do so, as she will have ample money to purchase elsewhere."

The remaining dispositions and directions do not afford aid in putting a proper interpretation upon the recited clause, further than is furnished by the fact of the reiteration of the controlling intent that the wife will be entitled to a third part of the net interest and rents of my part of the estate, during life or widowhood, which we reproduce as an illustration of the confused language used, and the necessity of supplying omitted words to make the meaning intelligible and consistent.

There are but three admissible methods of interpreting the disputed article, and it is our duty to ascertain and carry out, as far as practicable, the intent of the testator as declared therein, in the light of the other provisions of the instrument.

1. The clause gives to the wife an election to take and hold the manor lot and other property in fee, in place of two-thirds of all for life and one-third in fee before given; or

2. The election of this in place of and as part of the one-third given in fee; or

3. An election to convert the described property, by sale, into money, and the transfer of her rights thereto in the plight in which they attached to the property sold.

The structure of the sentence itself, not less than other parts

of the will, forbids either the first or second modes of construction for reasons which we will briefly notice:

I. The first would greatly enlarge the value of the gift to the wife, everywhere else recognized, by adding all the slaves not specifically bequeathed in remainder, and, as would seem, a large part of the personal estate.

II. The clause itself, which equally bestows the lot and land and the slaves, immediately declares, not as a qualification, but as a precedent disposition still in force, that she "will have two-thirds during widowhood and one-third in fee."

III. The estate is not defined, and if the words "to have" are intended to give her possession and use, they are inoperative, since she has the right to possess and use both, without the words.

IV. The substitution of this, in place of the one-third in fee of all, is incompatible with the limitation of the wife's absolute interest to an undivided one-third part in all, and in excess of it.

We are constrained, therefore, to refuse to put a literal interpretation upon the clause, and, with some reluctance, to supply an evident ellipsis in the language employed, in order to give reasonable effect to the disposition and carry out the testator's general intent.

In a previous clause, a sale of certain property is contemplated, and in the next is mentioned that which remaining unsold will have to be divided, and in regard to both the original and converted property, the wife is to take the estate and proportion in the manner pointed out in the beginning of the will. It would produce an entire disruption of the plan of distribution, if under this clause the wife were to take, or *have*, in absolute right, the land described therein and all the slaves except the remainder in those specially bequeathed, a result at variance with a repeatedly declared purpose, that while enjoying nearly all for life, she should have absolute title and right to dispose of but one-third part.

Looking to the structure of the sentence, it is obvious that some word is omitted and to be supplied to give it meaning and force. The expression, "in case it should be more convenient to my

wife," implies some contrast in the condition of the land and slaves, some change of its status and identity which could only be brought about by a sale and the substitution of another fund in its place. Again, in reference to the slaves, the testator expresses the opinion that "she ought to keep" them, evidently indicating a power conferred to sell, but advising against its exercise; for if not sold, they would be kept, and the advice would be without meaning. But she is left "at liberty to do so"—do what had been already authorized—dispose of them.

The concluding expression is equally significant, "as she will have ample money to purchase elsewhere," indicating the source from which the ample money is to come, and plainly the loss of the real estate to be replaced by the purchase of land "*elsewhere.*"

The sentence will bespeak the testator's intent by adding the word "*sold*" after the word "have," and become intelligible and clear, and in harmony with the other provisions of the will.

There are obvious omissions in the instrument, and that we supply is but to give form to a clause that has already the substance, and thus maintain the integrity, of the dispositive instrument as a whole, and the consistency of its parts.

The most unsatisfactory of all judicial labor, perhaps, is found in the effort to arrive at the meaning of a testamentary paper, with but little light from adjudicated cases to aid, when they are so various in terms and often are prepared by persons careless in the use of language. This is full of perplexity, but keeping steadily in view the main rule of giving effect to the general intent, we must make doubtful individual clauses conform to that intent. *Lassiter* v. *Wood*, 63 N. C., 360; *Macon* v. *Macon*, 75 N. C., 376.

The numerous cases in the argument for defendant show that we are warranted by precedents in interpreting an omitted word, when demanded by the context, and indispensable to point the meaning of a clause. *Sessoms* v. *Sessoms*, 2 Dev. & Bat. Eq.

453; *Harrison* v. *Bowe*, 3 Jones' Eq., 478; *Purnell* v. *Dudley*, 4 Jones' Eq., 203; *Tayloe* v. *Johnson*, 63 N. C., 381; *Hill* v. *Toms*, 87 N. C., 492.

The finding by the court that the devisee, Ann, had made an election, is predicated upon a construction which allows her to take a fee simple in the lot, and as our interpretation that the election was to sell, and this has not been done, and the land was retained, the finding is a nullity, and does not affect the interests of the contending parties. For the error mentioned there must be a new trial, and it is so adjudged. Let this be certified.

Error. *Venire de novo.*

W. MABRY and others v. N. STAFFORD, Executor.

Wills—Parties.

1. A legacy to one deceased at the time the will was made, like lapsed legacies, goes to the residuary legatee, whenever it appears from the words of the will that the testator has not expressed a different intention.
2. The trustee of the residuary legatee is not a necessary party to an action, brought by the next of kin against the executor, to recover a sum bequeathed to one deceased, though the same may have been paid to the trustee by the executor.

(*Taylor* v. *Lucas*, 4 Hawks, 215; *Sorrey* v. *Bright*, 1 Dev. & Bat. Eq., 113; *Jones* v. *Perry*, 3 Ired. Eq., 200; *Lea* v. *Brown*, 3 Jones' Eq., 141; *Graves* v. *Howard*, *Ib.*, 302; *Coley* v. *Ballance*, 1 Winst. Eq., 89, cited and approved).

CIVIL ACTION tried at Spring Term, 1883, of ALAMANCE Superior Court, before *Gilmer*, J.

John Crawford died, leaving a will which bears date October 19th, 1874, and has since been admitted to probate, containing the following clauses:

"Item 5. I give and bequeath to my three nephews, John, Willis and Randall Mabry, four hundred dollars each, to them and their heirs forever."

"Item 8. I give and bequeath the balance of my estate, if there should be any surplus after my executor pays all the legacies heretofore willed, and all my just debts, my burial and funeral expenses, &c., the balance I will to the Methodist Protestant Church at Bethel, in Alamance county, North Carolina, to be used as the trustee of said church may deem best."

The complaint states that the legatee, John Mabry, was dead when the testator made his will, and the purpose of the present action, instituted by the plaintiffs, who claim to be the next of kin of the testator, is to recover the sum so given to the deceased legatee, as intestate and undisposed of property.

The answer alleges a full settlement of the estate, and a payment over of this money to the trustee of said church, except the sum of $91.76, for which the executor gave his note, and on this the trustee has sued and recovered judgment, and this payment was made after one Palsy Kater, a sister of the testator, had relinquished her claim on the fund to the trustee.

Among other defences, the answer (assuming its averments to be true) insists that the trustee of the church is a necessary party to the action, in order to a final adjustment of the controversy as to the fund.

Upon this state of the pleadings the defendant's counsel moved the court for an order requiring that he be made a party, and from the denial of the motion the appeal is taken to this court.

No counsel for plaintiffs.

Mr. J. W. Graham, for defendant.

SMITH, C. J., after stating the facts. Without adverting to the irregularity of making such a motion in the absence of any evidence of the fact on which it is predicated, except in the

unverified allegation contained in the defendant's answer, and accepting the statement as true that the entire fund has been accounted for and paid over to the residuary legatee, we approve of the ruling of His Honor in refusing the motion.

The residuary legatee having received the money bequeathed, and the executor having voluntarily paid over the same in recognition of his legal right thereto, the trustee has no interest in the controversy between the parties to this suit, which is to decide whether it belongs to the next of kin or to the residuary legatee. If the fund passes into and constitutes a part of the residuum, or, in the testator's own language, the "balance" of his estate, the plaintiffs, not being entitled thereto, must fail in their action. If it is to be considered as intestate property and goes to the next of kin, the authorized payment by the executor to the trustee, will be no defence to him against the rightful demand of the plaintiffs. Whether in such case the executor can retain the money from the trustee, or has an equity for re-imbursement, is a matter between them only, and should not be allowed to interfere with or delay the plaintiffs in prosecuting their remedy against the former.

While the appeal is thus disposed of, and with a view of facilitating the settlement of the action without further needless expense, we feel at liberty to announce the conclusions to which our examination has led in respect to the ownership of the legacy.

The authorities, we think, show that this, like legacies lapsing by the death of the legatee after the making of the will and during the testator's life-time, passes into the residuary fund, there being apt words to embrace it, and belongs to the residuary legatee. This rule of construction is fully supported by the adjudications in this court. *Taylor* v. *Lucas*, 4 Hawks, 215; *Sorrey* v. *Bright*, 1 Dev. & Bat. Eq., 113; *Jones* v. *Perry*, 3 Ired. Eq., 200; *Lea* v. *Brown*, 3 Jones' Eq., 141; *Graves* v. *Howard*, *Ibid*, 302; *Coley* v. *Ballance*, 1 Winst. Eq., 89. The exception is when, from other provisions of the will, it is appa-

rent the testator did not so intend. There is nothing in this to modify the general rule.

There is no error, and this will be certified.

No error. Affirmed.

J. S. and P. W. BRAWLEY v. JOHN COLLINS.

Wills— When the term "Property" is restricted to Personal Estate.

The testator provided "that all property, money and effects, willed by me to my wife, that may be left at her decease, shall be equally divided," &c.; *Held*, that the word "property," being associated with "money and effects" and taken in connection with other provisions of the will, has a restricted import and does not embrace the lands devised.

(*Foster* v. *Craige*, 2 Dev. & Bat. Eq., 209; *Williams* v. *Parker*, 84 N. C., 80; *Ex-parte Champion*, Busb. Eq., 246, cited and approved).

EJECTMENT tried at Fall Term, 1881, of IREDELL Superior Court, before *Seymour, J.*

The plaintiffs claim an undivided share in the land described in their complaint, and in the defendant's possession, under the will of Stephen Parker, their grandfather, the dispositive provisions of which, so far as they assist in the interpretation of the clause whose meaning is in dispute, are as follows:

2. It is my will that should my beloved wife, Mary, survive me, she should have a decent maintenance off all my lands during her natural life-time.

3. It is my will that my son, Solomon, have fifty acres of land off the lower end of my land, it being a purchase I made from Cyrus Hutchison.

4. It is my will that my wife, Mary, have all the balance of

my old tract of land on which I now live, including an entry made, adjoining Robert Hibbett's and a purchase made from Edwin Falls.

5. It is my will that my wife, Mary, have all of my stock of horses, cattle, hogs and sheep, excepting my sorrel mare, colt and a choice milch cow, which I will to my daughter, Betsy.

6. It is my will that my wife, Mary, shall have all my household and kitchen furniture, and all farming utensils, gears, tacklings and tools of every kind, and my wine-mill and loom.

7. It is my will that my daughter, Betsy, have seventy-five acres of land, including an entry of fifty acres, made by me, where Joseph Parker now lives, and twenty-five acres of my Bell tract, adjoining said entry, so as to make the aforesaid quantity of seventy-five acres.

8. It is my will that my grandson, Stephen Parker, Franklin Parker's son, have all the balance of my Bell tract of land, with my son, Franklin Parker, and his wife, Celia Parker, to have the use of said land during their life-time. I further will that my son, Franklin, have my wagon.

9. It is my will that my daughter, Betsy, have her bed and bed-clothes, two wheels, one chest and other property heretofore claimed by her.

10. It is my will that my wife, Mary, have all money and effects due me, after my just debts being paid, together with all property not named in this will.

11. It is my will that all *property*, money, and effects willed by me to my wife, Mary, that may be left at her decease, shall be equally divided between my daughter, Betsy, and grandsons, Stephen Brawley and Peter W. Brawley.

The plaintiffs assert title to the land in dispute as a limitation in remainder to them and their aunt in equal parts, after the death of the testator's wife, who by reason thereof had only an estate for her life therein, and this results, it is contended, from the use of the word *property* in the last recited clause, which

comprehends alike real and personal estate. The court was of opinion and ruled that the term has a more restricted import, and did not embrace the lands devised, in submission to which the plaintiffs took a nonsuit and appealed.

Messrs. Reade, Busbee & Busbee, for plaintiffs.

Messrs. Scott & Caldwell, A. S. Merrimon and *Robbins & Long*, for defendant.

SMITH, C. J., after stating the case. The only question for us to determine in passing on the appeal is as to the correctness of this construction of the clause, and the sense in which the word is used in this connection by the testator.

Considered by itself, the term "*property*" undoubtedly embraces real and personal estate, *Foster* v. *Craige*, 2 Dev. & Bat. Eq., 209, and such must be its meaning unless restricted by the context, or shown by other parts of the instrument, not to have been so intended by the testator. The leading object in the interpretation of all testamentary papers is to ascertain and give effect to the purpose of the testator, and to find out in what sense the words were used by him. The word "property" is found in the 9th, 10th and 11th clauses of the will, and, in the two former, evidently employed to designate personal things. In the 10th clause, it follows an enumeration of certain small articles of household furniture, and is plainly intended to cover such articles as are not specifically mentioned, but are of the same general class with those that are. In the succeeding clause, it is in association with "money and effects," and is, as in the preceding, necessarily confined to personalty, since "all the property not named in the will" must exclude realty which is named and devised.

The 11th clause also associates "all property, money and effects," and as the other disposes of what had been omitted, this disposes of such as had been specified and given to the widow, which remained at her death. The words are evidently used in

the same sense in both paragraphs, and bear an obvious relation to each other. . Unless the testator intended to limit the significance and scope of the expression as used in both clauses, why should he have added the qualifying words, "that may be left at her decease," in the latter? Manifestly, as land is not subject to a contingency, since it *must*, not *may be*, left, when the life estate expires, he intended such goods as might be destroyed or consumed by the preceding owner, but in fact are not, but remain for the bequest in remainder to operate upon. *Williams* v. *Parker*, 84 N. C., 90.

The integrity and consistency of the will, as a whole, and of its constituent parts, should be upheld when it can be done upon any reasonable interpretation, instead of putting a construction upon its separate provisions that make a direct repugnancy. The wife has secured to her a maintenance out of *all the lands*, and the home place where she and her husband resided is devised in fee. This estate would be cut down to a life-estate if included in the limitation over after her death, and put upon the footing of the clause which charges her maintenance in general terms upon all his lands.

Then the close association of the word itself with "money and effects" in both clauses indicates a common and the same meaning in each, and our duty is not to inquire what it may comprehend, but what it does signify, and in what sense the testator uses, and when this is satisfactorily ascertained from an inspection and comparison of the several provisions of the instrument, the construction must be adopted which carries out the intent.

It is seldom that we can derive aid from an examination of adjudicated cases, as we have had occasion before to remark, in consequence of the great diversity of terms in which a testator expresses himself, and hence each case must be determined by itself, keeping in view the leading purpose to ascertain the intention from the language and give it effect when practicable. The cases cited are illustrations of the rule referred to, which restricts

the meaning of a general word by those that follow and require it. See *Ex-parte Champion*, Busb. Eq., 246.

We, therefore, concur with His Honor that the plaintiffs do not derive title to any share in the land in suit under the 11th clause of the will, and the judgment must be affirmed.

No error. Affirmed.

STATE v. ELI O'KELLY.

Appeal in State Cases.

1. Appeals in criminal as well as in civil cases must be taken to the *next* ensuing term of this court.
2. Where the judge who tries a criminal action goes out of office before making up the case on appeal, a new trial will be awarded, provided the defendant himself is guilty of no laches.

(*Isler* v. *Haddock*, 72 N. C., 119; *State* v. *Fox*, 81 N. C., 576, cited and approved).

INDICTMENT for bigamy tried at June Term, 1882, of WAKE Superior Court, before *Bennett, J.*

After verdict of guilty and before the judgment was pronounced, the judge resigned and the office became vacant. James C. MacRae being appointed his successor, qualified, and presided at the same term, and upon motion of the solicitor, proceeded to judgment against the defendant, from which he appealed.

Attorney-General, for the State.

No counsel for defendant.

RUFFIN, J. As the judge who presided at the trial, and before whom the exceptions were taken had gone out of office,

no statement of the case on appeal was ever prepared, or filed with the clerk below, nor was any ever sent to this court. The transcript of the record was filed with the clerk here on the 29th day of January, 1883.

When the cause was called the Attorney-General moved to dismiss the defendant's appeal upon the ground of his laches, in that, he failed to docket the transcript at the October term last of this court.

The retirement from office of the judge who presided at the trial, put it out of the defendant's power to have his exceptions stated, and he would, therefor, without doubt, have been entitled to a new trial under the rule laid down in *Isler* v. *Haddock*, 72 N. C., 119, and that class of cases, provided he had been diligent in docketing his appeal. But parties cannot be permitted to dally with the courts in any such manner. If they take appeals, they must press them with earnestness, and not in such wise as to leave the impression that they are seeking delay in the execution of the sentence, rather than a reversal of the judgment. The decision in *State* v. *Fox*, 81 N. C., 576, was put partly on this ground, and it commends itself to the court, with whom the maxim is, *leges vigilantibus non dormientibus factæ sunt.*

We have more than once said that an appeal meant an appeal to the *next term*, and if neglected to be so taken, the party would have no favors extended to him. Acting upon this principle, we feel constrained to yield to the motion of the Attorney General.

The judgment of the court below is, therefore, affirmed, and this will be certified, to the end that the cause may be proceeded in according to law.

No error. Affirmed.

STATE v. JOHN RANDALL and others.

Appeal in State Cases.

1. It is the duty of the judge who tries a criminal action to make up the case on appeal.
2. The rule laid down in the preceding case in reference to the duty of the appellant to be diligent in perfecting the appeal, approved.

(*State* v. *Langford*, Busb., 436; *State* v. *Hart*, 6 Jones, 389; *State* v. *Powers*, 3 Hawks, 376; *State* v. *Murray*, 80 N. C., 364; *State* v. *Fox*, 81 N. C., 576, cited and approved).

INDICTMENT for murder tried at Spring Term, 1881, of BUNCOMBE Superior Court, before *Bennett, J.*

Attorney-General, for the State.

Messrs. McLoud & Moore, H. B. Carter and *Johnson & Shuford*, for the prisoners.

RUFFIN, J. The prisoners, charged with the murder of one Andrew H. Wells, were put upon their trial at spring term, 1881, and were convicted of manslaughter. After judgment was rendered against them, sentencing them, each to pay a fine of thirty-three and one-third dollars, they prayed an appeal, which was allowed, without security, upon their making the necessary affidavit.

At the February term, 1882, of this court, they caused to be filed a certified copy of the record of the cause, accompanied with an affidavit, in which they set forth that during the progress of their trial many exceptions were taken for them to the rulings of the court, touching questions of law affecting their case, which they hoped by their appeal to have reviewed; that with this view their counsel at once applied to the judge, who tried the cause, to prepare the statement of the case on appeal, supposing that it was his duty to do so, and not doubting his

willingness, but to their surprise he declined, saying that the law imposed no such duty on him; that their counsel then applied to the solicitor of the district to unite with him in making up the case for the judge's approval and signature, but that officer also declined, saying that it was the duty of the judge, and not of himself, to prepare the appeal; that not knowing what else to do, their counsel then wrote to the attorney-general of the state to know if he would accept a case made out by the solicitor and themselves, and upon being assured that he would, they again applied to the solicitor to unite with them, but this request was also refused.

Upon the strength of this affidavit the counsel for the prisoners in this court moved for a writ of *certiorari* to be directed to the judge, clerk, and other officers of the said superior court, commanding them to send up a record and transcript of the said trial and proceedings thereon, which writ was awarded at October term, 1882, of this court; but by that time the judge who tried the cause had gone out of office, so that no return was made, beyond sending up the record proper, and thereupon the counsel move for a new trial, as a matter of necessity and right.

The court entertains no doubt upon the point as to whose duty it was to prepare the case on appeal for the prisoners. The provisions of the Code of Civil Procedure, in regard to the manner of taking and preparing appeals, apply only to civil actions. In criminal actions they are still regulated by the act of 1818, in substance the same with Rev. Code, ch. 4, § 21, and under it the decisions all point to the presiding judge as the one person upon whom that duty devolves.

In *State* v. *Langford*, Busb., 436, there was some discrepancy between the exceptions as taken by the counsel and the statement of the case as made up by the judge; and the question was which should be acted upon. In determining the matter NASH, C. J., emphatically declared that the court could look only to the judge's statement, *since the law made it his duty to give a statement of all that relates to the exceptions.*

In *State* v. *Hart*, 6 Jones, 389, it was said that the bill of exceptions, signed by the judge who presided at the trial, "could alone certify to this court the proceedings on the trial, including the evidence given, the instructions prayed for, and those refused or given."

In *State* v. *Powers*, 3 Hawks, 376, a new trial was granted as a matter of right, because of the fact that the presiding judge had lost his notes of the trial, and declared that in consequence thereof he could not present the points made on the trial, and which were intended to be presented by the appeal.

In *State* v. *Murray*, 80 N. C., 364, no bill of exceptions accompanied the case, and the judge who tried the cause had gone out of office. A new trial was asked for on that ground, and was refused only upon the ground that it did not appear that the judge had ever been applied to to make up the case, and the court could not, therefore, tell whether he or the party was really in default—thus clearly indicating that if applied to it would have been the judge's duty to make out the case, and that his failure to do so would have been a wrong done to the defendant.

Holding it, therefore, to have been the plain and positive duty of the judge, when asked, to have prepared the case on appeal for the prisoners, the court would not have the slightest hesitation in awarding them a new trial if they had not otherwise been guilty themselves of laches. But the trial of their cause took place at the spring term, 1881, of the superior court, and they then had immediate and full notice of the judge's default, and of the danger which threatened their appeal, and it became their duty to be prompt in seeking their remedy. Instead, however, of doing so, they permitted a full term of this court, and nearly a full twelve months, in point of time, to pass before asking the aid of the court in the premises, or even docketing their cause here.

In *State* v. *Fox*, 81 N. C., 576, and in *State* v. *O'Kelly*, *ante*, 609, it was held that by such a delay a party forfeited all claim to the help of the court; and so we must hold in this case.

Indeed, it furnishes the very best illustration of the reason of the rule laid down in those cases. By making their application promptly and at the first ensuing term, the prisoners would have put it in the power of the court, by proper process, to compel the judge, who tried the cause, to do that which the law made it his duty to do in the premises; and it is only through their own delay that the opportunity has been entirely lost; and it would be neither just nor reasonable to permit them to take advantage of their own wrong.

The motion for a new trial is, therefore, overruled, and the judgment of the court below is affirmed.

Let this be certified, to the end that the cause may be proceeded in according to law.

No error. Affirmed.

STATE v. WILLIAM COPPERSMITH and another.

Affray—Jurisdiction.

An affray is cognizable in the superior court, as to both defendants, where it appears that a deadly weapon was used by either.

INDICTMENT for an affray tried at Fall Term, 1882, of PASQUOTANK Superior Court, before *Gilliam, J.*

The defendants, Coppersmith and Hayes, are charged with an affray, and each with making an assault upon the other with a deadly weapon. The jury found both guilty.

Upon the trial it was shown that Coppersmith struck the other defendant with a small stick, inflicting no serious damage, whereupon the latter discharged a loaded pistol at his assailant.

The court being of opinion that the superior court had no juris-

diction of the offence of the said Coppersmith, as disclosed in the evidence, "dismissed the action as to him," and from this ruling the solicitor appealed.

Attorney-General, for the State.
No counsel for defendant.

SMITH, C. J. The ruling is erroneous, since on a conviction of an offence cognizable by the court, as described in the bill of indictment, it must, upon motion of the solicitor, proceed to judgment, unless the verdict be set aside and a new trial ordered. The record shows that the defendants have, each of them, committed a criminal act within the jurisdiction of the trying court, and for which no motion in arrest of judgment could be entertained.

The order of dismissal is, therefore, erroneous and inconsistent with the record, and the state is entitled to judgment against each defendant, consequent upon the verdict as it stands.

The ruling of the court below must be reversed, and this will be certified to the end that judgment may be rendered.

Error. Reversed.

STATE v. MATTHEW LEARY.

Assault and Battery.

1. The parties were disputing about a piece of land—the prosecutor on one side of a fence advanced towards the defendant with an axe—the defendant on the other side shot him across the fence; *Held*, the principle of self-defence has no application, but defendant is guilty of an assault.
2. Where the facts of a case of homicide constitute the crime of manslaughter, the same state of facts will make the case of an assault if no killing ensues.

STATE *v.* LEARY.

INDICTMENT for an assault and battery, tried at Fall Term, 1882, of CUMBERLAND Superior Court, before *Gilmer, J.*

The assault was made with a gun; the defendant was convicted, and upon judgment being pronounced against him, appealed to this court upon the ground of error committed in the charge of the court to the jury.

Attorney-General, for the State.
Mr. R. P. Buxton, for the defendant.

ASHE, J. The case is so imperfectly made out that we cannot see what were the facts. We can only infer them from the testimony proposed to be offered by the defendant, his instructions asked, and the charge of His Honor.

The only statement of facts contained in the record are, that the state, without objection from the defendant, proved by the prosecutor that the difficulty between him and the defendant occurred on land of which he was and had been for ten years in possession.

The defendant testified in his own behalf, and admitted that he shot the prosecutor with a gun, and proposed to prove that he was on his own side of the fence when he fired the gun—the line between him and the prosecutor having been previously run by a surveyor. This evidence was objected to by the state and not allowed by the court. The defendant excepted.

The defendant then asked the court to rule out the evidence introduced by the state to prove possession by the prosecutor, which was done.

This is all the evidence, in regard to the facts, disclosed by the statement of the case. There is not a word about the prosecutor's advancing upon the defendant with an axe raised in a threatening manner. But the defendant asked the court to instruct the jury, "that if the prosecutor found the defendant on the disputed land and advanced upon the defendant with an axe in a threatening manner, and was warned by the defendant to

stand back, but continued to advance upon defendant—then defendant was justified in using the gun in self-defence, if the jury shall believe the defendant was in danger of being stricken with the axe."

The court, in response to this request, instructed the jury that if the prosecutor found the defendant on the disputed land and advanced upon him with an axe in a threatening manner, and was warned by the defendant to stand back, but continued to advance upon him, then the defendant was justified in using the gun in self-defence, if the jury believe that he was then and there, by reason of the proximity of the prosecutor, his ability to strike, and under all the circumstances of the case, in danger of being stricken with the axe. The defendant excepted to the charge.

This was the only exception taken by the defendant, except that to the exclusion of the testimony of the defendant in regard to his possession on his side of a line run by a surveyor. There was no error in that ruling.

Nor can we see there was any error in His Honor's charge to the jury.

Taking the whole record together, and gathering the facts as well as we can from it, we take it, that the prosecutor and defendant were in dispute about a piece of land; that there was a fence running somewhere upon the disputed territory, and the prosecutor being on the one side of the fence and the defendant on the other, the prosecutor advanced towards the defendant with an axe in his hand, and the defendant shot him across the fence. If such be the state of facts, and it is the only one, we think, that can be reasonably deduced from the meagre statement of the case, if the defendant had killed the prosecutor, he would have been guilty, at least, of manslaughter; and when the facts of a case of homicide constitute the crime of manslaughter, if no killing ensues, the same state of facts will necessarily make the case of an assault and battery.

If the facts are anything like those we have supposed, there is not the slightest pretext for the application of the principle of self-defence. We are unable to discover any error in the record. This must, therefore, be certified to the superior court of Cumberland that the case may be proceeded with according to this opinion and the law.

No error. Affirmed.

STATE v. R. S. NASH.

Assault, justification in—Evidence.

A defendant, who has reason to believe, and does believe, at the time and under the circumstances, that he is in immediate danger, is justified in resisting his assailant, though the danger did not in fact exist; but the jury must determine the reasonableness of his belief; *Therefore*, it was error to exclude from the consideration of the jury the evidence upon which such belief is grounded.

(Chief-Justice SMITH, dissenting.

(*State* v. *Scott*, 4 Ired., 409, cited and approved).

INDICTMENT for an assault and battery tried at Fall Term, 1882, of RICHMOND Superior Court, before *Gilmer, J.*

The indictment charged that the assault was committed with a deadly weapon. (See *State* v. *Nash*, 86 N. C., 650).

On the trial, Nathan Reynolds, the person on whom the assault was made, testified for the state, that on the night of the 23d of December, 1879, he and other young men of the neighborhood made up a "bell crowd" of about twenty in number, and between eight and nine o'clock that night, went around the defendant's house, ringing bells and blowing horns, and that

some of the party carried guns, and perhaps pistols, which were fired off a few times, and after they were going away from the house and had got about thirty-five yards off (but still within the defendant's enclosure, not having reached the gate), the defendant came out on his porch and fired his gun at the crowd, inflicting a serious wound on the witness by shooting into his leg eight shot (of the size of duck shot), three of which still remain therein, the others having been extracted.

The defendant was put upon the stand as a witness in his own behalf, admitted that he fired the gun at the crowd, and proposed to prove that before he fired, his child, who was sleeping near a window in the house, through which the noise of the bells and horns and firing was heard and the flash of the firing seen, rose up and ran to the witness with blood on her face (caused as he afterwards learned, but did not then know, by her running against the end of a table), and under the impulse of the moment, believing that she had been shot, he got his gun and went to the door, and, seeing the flash of pistols fired as he supposed by the retreating crowd, fired his gun at and into the crowd. This evidence was objected to by the state and excluded by the court, and the defendant excepted.

The defendant also proposed to testify that on the next day he saw some shot embedded in the plank of the house, which were not there the day before. Objected to and excluded. Defendant excepted.

The court instructed the jury that the defendant had not shown justification for the shooting. Verdict of guilty; judgment; appeal by the defendant.

Attorney-General, for the State.
Messrs. Burwell, Walker & Tillett, for the defendant.

ASHE, J. The question presented by the record is, was there error in the refusal of the judge to receive the evidence offered by the defendant. We are of the opinion there was error in

rejecting so much of the proposed testimony as tended to show, on the part of the defendant, a *reasonable ground of belief* that the trespassers upon his premises had fired into his house and wounded his child.

It may be, as testified by the prosecutor, that the band of young men, who went to the defendant's house on the night in question, only intended innocent amusement; but there is one unusual and rather extraordinary feature in the transaction, that the party intending a mere serenade, should, on such an occasion, carry guns and pistols; they are certainly very unusual instruments of music in the hands even of a calithumpian band.

They entered the enclosure, twenty in number; marched round his house, blowing horns, ringing bells and firing guns and pistols; which must have greatly frightened the family and the defendant himself, unless he is a man of more than ordinary courage. But whether awed or not by such a display of numbers and lawlessness, yielding to the dictates of prudence, he submitted to the humiliating indignity and remained within doors, until his little daughter, as he proposed to show, ran to him with her face bleeding; and believing, as was natural under the circumstances, that she had been shot, he seized his gun and went to the door, saw the flash of fire-arms, and shot into the crowd and wounded the prosecutor. We must suppose it was all the work of an instant.

Did the defendant, under these circumstances, have reasonable ground to believe that his daughter had been shot, and the assault upon him and his house was continuing? If he had, then he ought to have been acquitted.

We know this has been a much mooted question, but upon an investigation of the authorities, our conclusion is, that a reasonable belief that a felony is in the act of being committed on one, will excuse the killing of the supposed assailant, though no felony was in fact intended. And whatever will excuse homicide, will of course, excuse an assault and battery.

In *State* v. *Scott*, 4 Ired., 409, the court say: "In consulta-

tion it seemed to us at one time that the case might properly have been left to the jury, favorably to the prisoner, on the principle of *Levet's case*, Cro. Car., 538 (1 Hale, 474), which is, that if the prisoner had reasonable ground for believing that the deceased intended to kill him, and under that belief slew him, it would be excusable, or at most only manslaughter, though in truth the deceased had no such design at the time." It is to be noted that Levet was acquitted. But the court did not give the prisoner, in *Scott's case*, the benefit of the principle, for the reason that no such instruction had been asked in the court below, the court concluding that the prisoner would have requested the instruction, if he had acted upon such belief; and there were besides other circumstances in the case, which prevented the application of the principle. But it is clearly to be deduced from the opinion of Chief-Justice RUFFIN, who spoke for the court, that in a proper case, the principle might be invoked to excuse a defendant. See also, *Patterson* v. *People*, 46 Barb., 627.

The same doctrine was enunciated by PARKER, J., afterwards Chief-Justice of the supreme court of Massachusetts, in the famous case of *Commonwealth* v. *Selfridge*, Self. Trial, 100, and the principle is thus illustrated: "A, in the peaceful pursuit of his affairs, sees B walking towards him with an outstretched arm and a pistol in his hand, and using violent menaces against his life as he advances. Having approached near enough in the same attitude, A, who has a club in his hand, strikes B over the head before or at the instant the pistol is fired, and of the wound B dies. It turned out that the pistol was in fact loaded with powder only, and that the real design of B was only to terrify A." The judge inquired: "Will any reasonable man say that A is more criminal than he would have been if there had been a ball in the pistol?" 2 Whar. Crim. Law, § 1026 (g) and note; Whar. Law of Homicide, 215, *et seq.*

But it may be objected that the defendant acted too rashly: before he resorted to the use of his gun, he should have taken the precaution to ascertain the fact whether his child had been

actually shot. But that doctrine is inconsistent with the principle we have announced. If the defendant had reason to believe and did believe in the danger, he had the right to act as though the danger actually existed, and was imminent. Taking, then, the fact to be, that the trespassers had fired into defendant's house and shot his child, and the firing continued, there was no time for delay. The occasion required prompt action. The next shot might strike him or some other member of his family. Under these circumstances, the law would justify the defendant in firing upon his assailants in defence of himself and his family.

But, as we have said, the grounds of belief must be reasonable. The defendant must judge, at the time, of the ground of his apprehension, and he must judge at his peril; for it is the province of the jury on the trial to determine the reasonable ground of his belief. And here, the error is in the court's refusing to receive the proposed evidence, and submitting that question to the consideration of the jury. A *venire de novo* must be awarded.

SMITH, C. J., *dissenting*. I am unable to concur with the other members of the court, in the conclusion reached, that the testimony of the defendant in explanation of his conduct, if admitted and believed, would be a defence to the charge, or have any other legal effect than to mitigate his offence, and hence, as immaterial upon the issue and tending to mislead, there is no error in rejecting it.

The facts in connection with this proposed statement are summarily as follows: A boisterous and unruly crowd, in what seems to have been a frolick, enter the defendant's premises in the early night with bells, horns and fire-arms, by the noise of which, as they pass around his dwelling, himself and his family are greatly annoyed and their peace disturbed. As they are about to leave, his little frightened daughter runs up to him with blood upon her face, caused by her striking against a table, but which he then supposed to proceed from a shot wound. Acting upon the

impulse produced by this misconception and without stopping to make inquiry as to the cause or extent of the inquiry, he seizes his gun loaded with shot of large size, hastens to the door and out into the porch, and, seeing the flash of a gun, fires into the retreating body then near the outer gate, some thirty-five yards distant, without a word of warning or remonstrance, and wounds one of the number in the leg.

This was, in my opinion, a hasty and unauthorized act in the use of a deadly weapon, not in defence of himself or family, or premises, but the offspring of a spirit of retaliation for what he erroneously supposed to have been done, and whose error could at once have been corrected. If death had ensued, the circumstances would not have excused the homicide; and as it was not fatal, it cannot be less than an assault.

Human life is too safely guarded by law to allow it to be put in peril upon such provocation; and, however much it may palliate the defendant's impulse and the rash act in which it resulted, it cannot, in my opinion, excuse his use of a deadly instrument in so reckless a manner.

PER CURIAM. *Venire de novo.*

STATE v. B. JOHNSTON.

Comments of Counsel—Larceny.

"If the defendant did not make the tracks, who did? If he did not make them, and they were made by another, the defendant ought to show it"; *Held*, that these remarks of the solicitor in his argument to the jury on a trial for larceny, where there was proof that the tracks about the premises corresponded with those made by the defendant at another time and place, were not objectionable, especially when the exception is taken after verdict.

STATE *v.* JOHNSTON.

INDICTMENT for larceny tried at Fall Term, 1882, of MECKLENBURG Superior court, before *Graves, J.*

There was a verdict of guilty, and a motion for a new trial. The motion was overruled and sentence pronounced by the court, from which the defendant appealed.

Attorney-General, for the State.
Messrs. Jones & Johnston, for defendant.

ASHE, J. Besides other evidence offered on the part of the prosecution tending to show the guilt of the defendant, the state made proof that tracks were found on the outside of the house in a bank of ashes just under the window, which had been opened; that the tracks came from and led back to the house of the defendant; that they were peculiar, one being longer than the other, one shoe square-toed and the other round, and in one of the shoes the big toe protruded and made an impression on the ground; that the tracks corresponded, in size and in detail, with the tracks made by the defendant in the field where he was ploughing the next day. The defendant offered no evidence.

The solicitor in his argument said, "if the defendant did not make the tracks, who did? If the defendant did not make them, if they were made by another, the defendant ought to show it."

There was no exception taken at the time to these remarks, but after verdict they were made the ground for the motion for a new trial, the defendant contending that the solicitor had gone beyond his duty, and violated the provision of law, which forbids comment on the fact that the prisoner does not offer himself as a witness.

We do not appreciate the force of the exception. We are unable to see how the remarks of the solicitor are obnoxious to the objection made by the defendant. If the tracks were in fact made by any other person than the defendant, it was quite as competent for him to prove that fact by other witnesses who were acquainted with the tracks of that other person, as by himself.

There was nothing in the remarks which necessarily lead to the conclusion that the tracks, if made by another, must be proved by the witness himself.

We are of the opinion the remarks of the solicitor were unobjectionable, and that there is no ground for a *venire de novo*. There is no error. Let this be certified, &c.

No error. Affirmed.

STATE v. M. E. HAYNE.

Concealed Weapons.

Neither a deputy marshal of the United States, nor any other civil officer, has the right to carry a weapon concealed about his person, while off his own premises, unless he is actually engaged in the discharge of his official duty; and the burden is upon him to show that fact.

INDICTMENT for a misdemeanor tried at Spring Term, 1883, of BUNCOMBE Superior Court, before *Avery, J.*

The defendant was charged with a violation of the act of 1879, ch. 127, in carrying a pistol concealed about his person. The act makes it unlawful for any person, except on his own premises, to carry concealed about his person any pistol, &c.; and exempts from its provisions, among others, all civil officers of the United States, of this state, of any county, city or town of this state, *while in the discharge of their official duties.*

The state introduced one Frances as a witness, who testified that on a certain night in May, 1882, while the United States court was in session in the town of Asheville, hearing a disturbance at a restaurant kept by a person of color in the town, and going to the place, he found the defendant there, intoxicated, and some of his friends carried the defendant to a boarding-house

kept by one Hill; and soon afterwards Hill sent up-stairs, where the defendant had gone, and brought him down, refusing to let him stay; that defendant thereupon put his hand behind him toward his hip-pocket, when Hill started off, declaring he would get his gun. Upon hearing this, the defendant ran out of the house and into a barber-shop, and dropped a pistol as he entered, which he picked up and put into his hip-pocket.

The defendant testified, in his own behalf, that he was a United States deputy marshal at the time (showing his commission), and continued to be such until his arrest for this offence, when his commission was revoked; that on the night referred to by the state's witness, he had process in his hands to be executed on citizens of Madison and Buncombe counties, consisting of commissioner's warrants and more than one *capias* issuing from the United States court, and that he frequently arrested persons after night.

His Honor charged the jury substantially, that if they were satisfied from the evidence that the defendant, while off his own premises, carried a pistol concealed about his person, he would be guilty, unless they believed that he was at the time actually engaged in the discharge of his official duty as deputy marshal; and that the burden was on him to show that he was at the time in the discharge of such duty.

The jury found the defendant guilty, and he appealed from the judgment pronounced.

Attorney-General, for the State.
No counsel for defendant.

ASHE, J. There is no error in the charge of the judge below. The law never intended to give persons, clothed with ministerial authority, the privilege of habitually carrying about their person concealed weapons, simply because they have in their hands warrants or process for the arrest of some one. The exemption

from the provisions of the statute is only given to such officers, while in the actual discharge of their official duties.

The defendant offered himself as a witness in his own behalf, and he did not pretend that he went to the restaurant with the expectation of meeting there any one against whom he had process, or that he was, on the night mentioned in the evidence, acting in the discharge of his official duties. He was, after night, at the restaurant of a colored man, intoxicated, and producing such a disturbance that he had to be carried off by his friends to a boarding-house in the town, and, when the proprietor refused to permit him to stay there, he attempted to draw his pistol, and would probably have done so, if it had not been for the prompt act of the latter in going for his gun, which caused the flight of the defendant.

The law gives no protection to a man under such circumstances, although clothed with the authority of a deputy marshal of the United States, and having at the time warrants and process in his possession.

The case does not fall within any of the exceptions of the statute. The defendant was properly convicted. There is no error. Let this be certified, &c.

No error. Affirmed.

STATE v. CUFF TRICE and others.

Conspiracy—Judge's Charge—Indictment—Person to the jurors unknown.

1. Indictment for conspiracy in three counts—first, for conspiring to commit rape upon F; second, the like offence upon E; and third, the same upon

"certain female persons to the jurors unknown"; *Held*, as there was no evidence of a common design, the defendants were entitled to a verdict of acquittal.

2. *Held further*, that the charge of the court, being, in effect, that the jury might convict upon the first two counts, unsupported by evidence, provided they thought the defendants guilty under the third count, is erroneous.

3. Distinction between cases where the indictment charges distinct offences in the different counts, as here, and those where the counts vary the same offence to meet the probable proofs, pointed out by RUFFIN, J.

4. Although the name of the person upon whom an offence is charged to have been committed, be to the jurors unknown, yet the proof must identify the party injured as completely as if his real name appeared in the indictment.

INDICTMENT for conspiracy tried at Fall Term, 1882, of WAKE Superior Court, before *McKoy, J.*

The defendants (with one Mack Cross, who was not on trial) are indicted in three counts: the first, for conspiring to commit rape upon the person of one Fidelia Upchurch; the second, for conspiring to commit the like offence upon one Effie Upchurch; and the third, for that "they did unlawfully conspire and agree together to commit rape, and, in pursuance and according to said conspiracy, did prepare certain powders, which they did then and there unlawfully conspire and agree to administer to certain female persons to the jurors unknown, with intent then and there feloniously to ravish and carnally know the said female persons to the jurors so unknown, &c."

On the trial, several witnesses testified to the general conversations with the defendant, Cuff Trice, in which he stated that he had a certain powder, or weed, by the use of which he could overcome any woman's scruples, and do with her as he pleased.

One John Dones testified that on one occasion he saw the defendant, Cuff, give some powders to the defendant, Charles Trice, and Mack Cross, telling them at the time that by using the powders they could overcome any woman; and that Cuff also offered to sell the witness some of the same powders, but

his offer was declined. Some time thereafter, on a certain Saturday night, the witness met the defendant, Charles, and had some conversation with him as to where he was going, and, after some hesitation, he told the witness that he was going to "Upchurch's to overcome his girls"—that he was going to sprinkle some powders on their arms and joints, and in that way overcome them. Witness then watched him and saw him enter the house of Upchurch, where he remained for a short time, and then came out running, and Upchurch after him.

Upchurch testified that on the night alluded to by the last witness, some one entered the room where his two daughters were sleeping, and got under their bed, but in so doing alarmed them; thereupon they called the witness and he immediately went to their relief. As he entered the room, he saw some one run out, and he made pursuit, but was unable to overtake him.

The defendants called several witnesses to contradict and discredit the witness, Dones, and their evidence was submitted to the jury on that point.

Amongst other things, the court instructed the jury, that "if there was a corrupt combination between the defendants, or one of them with Mack Cross, to do any of the acts mentioned in the bill, to-wit, to rape Fidelia Upchurch, or Effie Upchurch, or a female person to the jurors unknown, or to have carnal intercourse with them by the use of any powders fraudulently used, and by such influence to overcome them, then, it would be the duty of the jury to find those guilty who entered into such corrupt combination, even though there was no evidence that their purpose had been attempted or accomplished."

The defendants asked the court to instruct the jury that there was no evidence that the defendant, Cuff, knew that the powders sold by him were to be used upon Fidelia or Effie Upchurch. This was refused by the judge, because "he had just told the jury that it was sufficient, if the evidence satisfied them that they were to be used upon any female to the jurors unknown."

The jury rendered a verdict of guilty as to both the defendants upon all three counts in the indictment, and they appealed from the judgment pronounced.

Attorney-General, for the State.
Mr. W. J. Peele, for defendants.

RUFFIN, J. So far as can be seen from the statement of the case sent to this court, there was absolutely no evidence going to show that the defendant, Cuff Trice, connived at, or even knew of, the purpose of the other defendant to assault either of the two females whose names are specifically mentioned in the first and second counts of the indictment. He, then, was certainly entitled to the charge as asked at the hands of the court; and so was his co-defendant, since the offence charged was of such a character that the question of the guilt or innocency of one of the parties necessarily affected that of the other.

The refusal of the court to give the instruction asked, taken in connection with that actually given, was in effect to tell the jury they might convict the defendants, upon the two first counts, though unsupported by any evidence, provided they thought them guilty under the third count. Indeed, the charge admits of no other construction, and is, therefore, palpably erroneous.

It is not like the case of a general verdict of guilty upon an indictment, which contains some good counts and some defective ones. There, the rule is that the court may proceed to judgment upon the good counts, on the ground that the evidence was sufficient to justify a conviction upon each and every one of the counts; and the sentence of the court is presumed to have been given with reference to the good counts alone. But here, if any of the counts are good, all are good: they describe distinct offences, and not mere modifications of the same offence, varied so as to meet the probable results of the evidence, and the court is presumed to have proceeded to judgment under each and all of them, and, in fact has done so. In no case will the law permit a ver-

dict and judgment to stand against a party for an offence, of which the evidence taken in the cause does not convict him, even though other counts in the same indictment should be supported by proof.

But, more than this: what evidence in the case goes to support, in the least, the third count in the indictment, as pointing *to any certain female person to the jurors unknown*, as the subject of the conspiracy there charged?

In cases where the person upon whom an offence is shown to have been committed, really exists, and yet his name should be unknown to the jurors, the law, from necessity, allows it to be so charged in an indictment; but still, the proofs must as completely identify the party injured as though his real name appeared upon the face of the bill. This must be so, or otherwise the record in such a case would afford no protection to the accused in the event of a second prosecution.

It may be, and such seems to be the idea under which this indictment is drawn, that dealing in such articles as are mentioned in the indictment, under a belief, however absurd, that they would be productive of the effects described, is an offence against society and punishable as such, because tending to deprave public morals and to breaches of the peace. But, if so, they must be so charged, and not as offences against "certain persons to the jurors unknown."

There is not one particle of evidence in the cause to connect the defendant, Cuff Trice, with any offence upon any particular person, known or unknown, and none whatever tending to show any dealings, even, between the defendant, Charles, and Mack Cross, the other party named in the indictment. As a charge for a conspiracy, therefore, the prosecution must fail.

Error. *Venire de novo.*

STATE v. HENRY BEVERLY.

Evidence—Comments of Counsel.

1. Evidence that another committed the offence of which the defendant was being tried is inadmissible. The defendant must show that he is innocent, not that another is guilty.
2. Whether counsel should be stopped, in the use of improper language in addressing the jury, at the time, or in the charge to the jury, is matter of discretion with the judge. Remarks of counsel in this case are not objectionable.

(*State* v. *Davis*, 77 N. C., 483; *State* v. *Bishop*, 73 N. C., 44, cited and approved).

INDICTMENT for larceny and receiving tried at Spring Term, 1882, of STANLY Superior Court, before *Gudger*, *J.*

The defendant was tried and convicted of receiving a bale of cotton, the property of one Clark, knowing the same to have been stolen.

The state offered evidence going to show that the cotton was taken from the gin-house of the prosecutor on the night of the 8th of January, 1880, and that it was found on the next day concealed in the shuck-house of the defendant, about thirty yards from his dwelling; and there was other evidence tending to connect the defendant with the concealment.

The defendant appealed from the judgment pronounced upon the verdict.

Attorney-General, for the State.

No counsel for the defendant.

RUFFIN, J. Two exceptions were taken for the defendant:

1. That he was not permitted to show that one John Dutton, who lived with him at the time the cotton was stolen, and who had been indicted in the same bill with him, but had severed his trial, had been convicted of the offence for which he, the defendant, was then on trial.

As the guilt or innocence of Dutton was not necessarily connected with that of the defendant, and as the offence charged could as well have been committed by both as by one, evidence as to the guilt of one could not in the least tend to establish the innocence of the other. *State* v. *Davis*, 77 N. C., 483. A confession of his guilt by Dutton, or even the record of a judgment againt him, could not be received as evidence for the defendant, being *res inter alios acta*. *State* v. *Bishop*, 73 N. C., 44.

2. The defendant was examined as a witness in his own behalf, and it was conceded by the state that, up to the time of the commission of the alleged offence, his character was good. In addressing the jury, the solicitor said: "They tell you the defendant is a man of good character. But how common it is for men of good character to fall. We hear of it; we read it in the newspapers, of men of high position in church and state suddenly falling. All men have good characters at sometime in their lives. No man is born with a bad character. Crime has a beginning, and so it may be in this case." The judge did not stop the solicitor at the time, though his language was objected to; but in his charge, he called the attention of the jury to the language used, and told them that they should not consider it, and the argument should not weigh with them; that they should consider only the evidence offered before them, and nothing beyond it. The defendant excepted, because the court failed to stop the solicitor at the moment the words were used and the objection was first made.

The court is at a loss to see anything objectionable in the words used by the counsel for the state. Jurors are not expected to discard common sense, or to close their understandings to the lessons taught them by their own general observation and experience in life. It cannot, therefore, be improper for counsel to refer to such matters as furnishing ground for such inferences as he may think proper to make. If really objectionable, the wrong was corrected in the instructions given to the jury; and

the court must be its own judge as to the time when the correction shall be made.

The judgment of the court below is affirmed, and this will be certified to that court in order that it may proceed according to law.

No error. Affirmed.

STATE v. SYLVESTER LAWHORN.

Evidence—Declarations of Defendant—Rule in reference to Fragmentary Evidence—Judge's Charge.

1. A defendant who avails himself of the privilege of testifying in his own behalf, may be asked on cross-examination whether he has been convicted of certain criminal offences, with a view to affect his standing as a witness.
2. And his declarations, pertinent to the issue, made in the hearing of a witness, are admissible against him. The rule excluding evidence, as being fragmentary, does not apply to such a case, but is confined to cases where proof is offered to show what a deceased person had said or testified to.
3. The law governing the defendant's right of self-defence was correctly stated by the court in charging the jury.

(*State* v. *Efler*, 85 N. C., 585; *State* v. *Patterson*, 2 Ired., 346; *State* v. *Garrett*, Busb., 357; *State* v. *Davidson*, 67 N. C., 119; *Buie* v. *Carver*, 73 N. C., 264; *Ingram* v. *Watkins*, 1 Dev. & Bat., 442, cited and approved).

INDICTMENT for assault and battery, removed from Lenoir county, and tried at Fall Term, 1882, of DUPLIN Superior Court, before *MacRae, J.*

The defendant is charged with an assault and battery with intent to kill, committed upon one Bryan.

As made by the evidence offered for the prosecution, the case is as follows: The parties accidentally met in the streets of Kins-

ton, the defendant being partially intoxicated. Upon learning who the defendant was, Bryan asked him how he had come out in his difficulty with one Cox, to which he replied by asking "what have you got to do with it? what is Cox to you?" Bryan told him that Cox was a friend of his, but that he had only inquired of him from a desire to know how their difficulty terminated. The defendant then began to curse Bryan, and upon his turning to leave, caught him by the shoulder and jerked him back, saying: "I want to know who in the hell you are, and what you've got to do with Cox?" and upon being answered as before, drew his pistol. Bryan said to him that he did not fear his pistol, but that he should avoid a difficulty as far as he could; whereupon the defendant accused him of having drawn a knife, but was assured that it was not so, and that he only had a small knife, with which he had been whittling. At the suggestion of a friend present, Bryan put up his knife, when the defendant began again to abuse him. A policeman come up, and learning what had transpired, laid his hand upon the defendant, and told him to consider himself under arrest. The defendant then said, "I don't intend to be imposed upon by any such d—d son-of-a-bitch," which Bryan said he could not stand, and struck the defendant, who immediately shoved him back, and shot him in the side with the pistol.

As made for the defendant, the case is as follows: The defendant passed two men in the street whom he did not know. After he had gotten some ten steps beyond them, he heard them talking low to themselves, and then one of them, who turned out to be Bryan, called to him so that he turned back. Bryan then said to him, "do you want to whip Cox," to which he replied, "no, whenever I get ready to whip any one I'll do so." Bryan then declared that Cox was his friend, drew a knife, and said he would use it on the defendant if he fooled with him, or said he wanted to whip Cox. The parties then quarreled and cursed each other, Bryan having his knife in his hand and the defendant having his hand on his pistol. The policeman interfered, caught hold

of the defendant and pushed him back, and told him to consider himself in arrest. He again cursed Bryan, and upon being stricken by him, shot him with the pistol. Defendant afterwards found that his coat had been cut with a knife. The defendant was examined as a witness in his own behalf, and upon his cross-examination was required to say, notwithstanding his objection, that he had been twice indicted for fighting and once for fornication and adultery; to which he excepted.

One Walters was examined, and testified that just before the difficulty between the parties occurred, he saw the defendant in conversation with two colored men, and, as he turned off from them to cross the street, heard him say that he "would shoot some d—d white-livered son-of-a-bitch before he slept." This was objected to by the defendant, but admitted as tending to show the reckless state of his mind; to which he excepted.

Amongst other instructions asked for the defendant, the court was requested to say to the jury that if they should believe that the defendant, when he was held by the policeman and assaulted by Bryan, had reasonable grounds to believe that Bryan had a knife, and apprehended death or great bodily harm, he had a right to use a pistol or other weapon necessary to his defence. This was refused, and the defendant excepted.

The court charged the jury that if the defendant first used language to the prosecutor calculated to provoke a breach of the peace, so that the prosecutor struck him, and he then shot the prosecutor, he would be guilty; that if the defendant called the prosecutor a d—d son-of-a-bitch, those words were such as were calculated to provoke a breach of the peace, whether the policeman had his hand on the defendant at the time he uttered them or not; that if Bryan was advancing on defendant without provocation and with a knife, and the defendant was in danger of being killed or of sustaining great bodily harm, and to save himself, he shot the prosecutor, he would not be guilty, but even in that case, if the defendant had first used words calculated to pro-

voke a blow, and did so, from the prosecutor, then the defendant ought to have retreated as far as he could with safety, and unless he did so, he would be guilty.

After verdict and judgment against the defendant, he appealed, assigning for errors the exceptions taken to the evidence, and the refusal of the court to charge as asked. Other exceptions were taken, but they were expressly waived by counsel in this court.

Attorney-General, for the State.
Messrs. Strong & Smedes, for defendant.

RUFFIN, J. There is no force in any of the exceptions taken for the defendant. By availing himself of the privilege of testifying in his own behalf, afforded him by the statute, he assumed the character of a witness and became subject to every rule adopted by the courts for the purpose of testing the credibility of witnesses. *State* v. *Efler*, 85 N. C., 585. In this state, it is well settled that a witness may be asked on cross-examination whether he has not been convicted of offences calculated to affect his standing as a witness. *State* v. *Patterson*, 2 Ired., 346; *State* v. *Garrett*, Busb., 357.

In *State* v. *Davidson*, 67 N. C., 119, it is said that the tendency of modern decisions is to allow almost any question to be put to a witness, and to require him to answer it, unless it should subject him to a criminal prosecution. The declarations of the defendant made in the hearing of the witness, Walters, were clearly admissible against him. Indeed it is hard to conceive of any case, whether criminal or civil, in which a party's own declarations pertinent to the issue could not be given in evidence against him. We know of no rule under which they could have been excluded, as being fragmentary in their nature. This circumstance might well affect their weight with the jury, and was, therefore, properly the subject of comment by counsel, but it furnished no ground for the exclusion of the testimony itself, it being otherwise clearly germane to the issue, as tending to show

the violent condition of the defendant's temper and disposition at the time. The case of *Buie* v. *Carver*, cited by counsel from 73 N. C., 264, is no authority in this case. That was a case in which a party undertook to show what a deceased witness had sworn on a former trial, and it was held that the witness was incompetent to do this, unless he was able to state the substance of all that was said by the deceased witness. But the rule seems to be confined to cases of that sort, and not even to extend to a case in which it is sought to impeach the testimony of a witness by showing contradictory statements made upon a previous examination in the cause.

In *Ingram* v. *Watkins*, 1 Dev. & Bat., 442, it was said that, on an indictment for perjury, it was not necessary that the prosecution should be able to prove all the evidence given by the defendant on the trial wherein he testified.

The law governing the defendant's right of self-defence was correctly laid down to the jury, and certainly with as much favor to him as he had any right to ask. In no case can a man be entirely innocent, who either provokes a fight or willingly engages in it; and it may well be questioned, therefore, whether it was not His Honor's duty to instruct the jury, that taking the defendant's evidence alone to be true, he was guilty of the offence charged against him.

There is no error in the jugment of the court below, and the same is, therefore, affirmed. Let this be certified, to the end that that court may proceed according to law in the premises.

No error. Affirmed.

STATE v. ROBERT PRATT.

Evidence—Declarations of Defendant—Judge's Charge.

1. The admission of incompetent testimony, unless objected to at the time or forbidden by statute, is not the subject of an exception at a later stage of the trial.
2. A defendant's declarations will not be excluded upon the ground that the witness did not hear the whole of the conversation of which they form a part. (See preceding case for rule in reference to fragmentary evidence).
3. In a joint trial for murder, it is the duty of the judge, if convinced that either prisoner is guilty of a less offence than that charged, to so instruct the jury, without regard to its effect upon the other prisoner. The assent of the solicitor given to a verdict of manslaughter as to one, the court in this case permitting it, is no expression of opinion as to the grade of the other's offence.

(*State* v. *Ballard*, 79 N. C., 627; *State* v. *Efler*, 85 N. C., 585; *State* v. *Swink*, 2 Dev. & Bat., 9, cited and approved).

INDICTMENT for murder tried at Fall Term, 1882, of WAYNE Superior Court, before *MacRae, J.*

Verdict of guilty; judgment; appeal by the prisoner.

Attorney-General, for the State.

Messrs. Allen & Isler, for the prisoner.

RUFFIN, J. The prisoner and Frank Moore were indicted and tried together for the murder of one Leonard O'Neil.

Many witnesses were examined for the prosecution, and amongst them one Bogue, who testified that he saw the prisoner and Moore on the day upon which O'Neil was killed. Witness was sitting in the corner of a fence, and saw them coming from the direction of the town of Fremont, and going towards the skirt of the woods where the body of the deceased was afterwards found. They crossed the fence about fifteen steps from where the witness was sitting; and just before getting to the fence, the

prisoner turned around and spoke so that witness could hear him, saying, "I'll be damned if I don't shoot him," to which Moore replied, "you must shoot him quick, then." While still in hearing of the witness, Moore mentioned O'Neil's name, and said he was a bad man.

On his cross-examination, the witness said when he first saw them coming towards him, he could hear them talking, but could not distinguish their words, so as to understand what they said, until they got close upon him. No objection to the introduction of this testimony was made at the time, nor was the court asked to withdraw it from the jury. But after verdict, the prisoner's counsel objected to it, as fragmentary, and being only part of a conversation, and its reception is the ground of the first exception.

After the case was given to the jury, they continued in deliberation during one whole night, and, coming into court the next morning, announced their inability to agree, and thereupon the counsel for the prosecution said to them, with the permission of the judge, that he was willing they should render a verdict of manslaughter as against Moore. The jury then retired, and soon afterwards returned with a verdict, finding the prisoner guilty of murder, and Moore, of manslaughter. This assent of the state's counsel to take such a verdict as to Moore, made in the presence of the jury, is the subject of the prisoner's other exception.

Realizing the immense interest which the prisoner has at stake, and the importance of our judgment to him, we have carefully examined the record in the case and considered his exceptions, to see if there can be any reason why the judgment against him should not be permitted to stand, but feel constrained to say that we have found none.

His exception to the testimony of the witness manifestly comes too late. A party will not be permitted to stand by, and without objection, suffer evidence to be heard and acted on by the jury, and then afterwards complain of its admission. The very case cited by prisoner's counsel (*State* v. *Ballard*, 79 N. C. 627), so

lays down the proposition, the only exception being, when the evidence admitted is declared to be incompetent by statute. The same distinction is recognized in *Efler's case*, 85 N. C., 585, where it is said, that the admission of incompetent evidence, unless objected to at the time or be forbidden by some positive law, cannot be the subject of an exception at a later stage of the trial.

But supposing it to be otherwise, and yielding to the prisoner the full weight of his exception, as if taken in time, it cannot be sustained upon its merits. It is the same in all respects with the exception taken and considered in *State* v. *Lawhorn*, *ante*, 634, where it is held that a party's own declarations could not be excluded, because the witness did not hear the whole of the conversation, of which they form parts.

It is impossible, as it seems to us, to adopt any other rule, without great danger of oftentimes excluding testimony most material and necessary. There can be no difference in principle between the case of a conversation, the whole of which was not heard, and one, the whole of which is not recollected. And how few conscientious witnesses there are, who, after the lapse of any considerable time, would undertake to recite the whole of any one conversation, while they might have a perfect recollection of its salient and material parts.

It is easy, it is true, to imagine cases in which mischief might result from taking fragments of a conversation, as gathered from an imperfect hearing, and applying them to matters foreign to the party's intention. But such things are not likely to occur in actual experience, and the correction may be safely left to the good sense of the jury.

It is difficult to conceive of any ground, upon which the prisoner can rightly complain of the action of the court towards his co-defendant. The assent given to a verdict of manslaughter as to him, was surely no expression of opinion as to the grade of the prisoner's guilt; or if so, not more than is unavoidable in every joint trial. The judge, and likewise the state solicitor,

owed the same duty to each of the parties then on trial, to see that he was not illegally or unjustly convicted; and if convinced that either was, in law or in fact, guilty of a less degree of offence than that charged in the indictment, it was his duty so to have instructed the jury, without regard to its effect upon the other defendant. If, in his main charge to the jury, His Honor had instructed them, that according to his understanding of the law, Moore was only guilty of manslaughter, and should have left it to them, without any other expression of opinion, to determine the question as to the prisoner's guilt, it would never, we presume, have entered the mind of any one to complain of his action. What difference, then can it make, at what stage of the trial this is done. Its effect, if it had any, upon the trial of the prisoner, must have been equally the same, whether done at one time or another. If prejudice resulted to him from the action of the court (and we regard the action of the solicitor in the matter, as that of the court), it is just such as is inseparable from the manner of conducting joint trials under our law, under such circumstances as admit of a difference in the guilt, or the degree of guilt, of the parties concerned.

The court is of the opinion that there is no error in the judgment, and the same is, therefore, affirmed. This will be certified to the superior court of Wayne county, with directions to proceed to judgment and sentence against the prisoner according to the law of the state.

No error. Affirmed.

NOTE.—The following was added by Mr. Justice RUFFIN: Since writing the above, we have recurred to the case of *State* v. *Swink*, 2 Dev. & Bat., 9, and find that it fully sustains our conclusions as to the admissibility in evidence of the prisoner's declarations. It is there said, Judge GASTON speaking for the court, that no authority or *dictum* is known for limiting the general principle, which makes a man's conduct and declarations, when voluntary, evidence against him, because his acts and declarations are not so complete as they were intended to be; that what he has said and what he has done, however unfinished and imperfect, is competent testimony against him, and its effect is to be judged of, under all the accompanying circumstances, by those whose duty it is to weigh the evidence.

STATE v. JOHN DICKSON.

False Pretence.

The indictment for false pretence in this case, and the proof to warrant the verdict of guilty, are supported by the decision in *State* v. *Eason*, 86 N. C., 674, and the cases there cited.

(*State* v. *Eason*, 86 N. C., 674, and cases cited, approved.)

INDICTMENT for false pretence tried at Fall Term, 1882, of CUMBERLAND Superior Court, before *Gilmer, J.*

The bill of indictment is as follows:

"The jurors for the state, upon their oath present, that John Dickson, late of the county of Cumberland, on the first day of March, 1882, with force and arms at and in the county aforesaid, devising and intending to cheat and defraud one John McRae of his goods, money, and property, unlawfully, knowingly and designedly did falsely pretend to the said John McRae, that he, the said John Dickson, had run three clamps of timber from Davis' bridge in said county to the mouth of Rock Fish creek, whereas in truth and in fact he, the said John Dickson, had not run three clamps of timber from Davis' bridge in said county to the mouth of Rock Fish creek, as he, the said John Dickson, then and there well knew, by color and means of which said false pretence, he, the said John Dickson, did then and there unlawfully, knowingly and designedly obtain from the said John McRae the sum of nine dollars, property of said John McRae, with intent to cheat and defraud the said John McRae, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state."

On the trial the prosecutor testified that he had one hundred and fifty sticks of ton timber in Rock Fish creek, which he desired to have rafted to market, and that the defendant came to him (the prosecutor then being confined to his house by sickness)

and contracted with him at a given rate per clamp, to raft said timber from Davis' bridge to the mouth of the creek; that shortly afterwards (the prosecutor being still confined to his house) the defendant came to him, and represented to him that he had run three clamps of timber from the said bridge into the mouth of the creek, and requested the advancement of some money therefor; that relying upon the representation to be true, he paid the defendant nine dollars, and that he had to employ another person to raft the timber. To all of which testimony the defendant excepted.

One Jordan Starke was then introduced by the state, who testified that he was afterwards employed by the prosecutor to raft the timber, and rafted one hundred and twenty-one pieces thereof from the bridge to the mouth of the creek; that there was no timber at all at the mouth of the creek when he arrived there; that after the time spoken of by the prosecutor, the defendant did run some timber into the mouth of the creek.

The defendant introduced no evidence, but requested the court to charge the jury that there was no evidence of the falsity of defendant's representation. The court declined to so charge, and the defendant excepted.

The jury returned a verdict of guilty, and the defendant first moved for a new trial upon the grounds taken by the exceptions, and that being refused, he moved in arrest of judgment, which was also refused. There was judgment against him, from which he appealed.

Attorney-General, for the State.

No counsel for the defendant.

ASHE, J. There was an exception taken by the defendant to the testimony of the prosecutor, but it amounts to nothing, especially after the testimony of Starke was introduced. It was properly overruled.

His next exception was to the refusal of the court to instruct the jury that there was no evidence of the falsity of defendant's representation. We concur with the ruling of His Honor upon this point, and are of the opinion that there was not only evidence of the falsity of the defendant's representation, but that it was sufficient, with the proof of the other ingredients of the crime with which he was charged, to warrant the jury in returning a verdict of guilty.

It has been repeatedly decided by this court, that to constitute the crime of "false pretence" under Bat. Rev., ch. 32, § 67, there must be a false pretence of a *subsisting fact;* the pretence must be knowingly false; the money, goods, or thing of value, of the person defrauded, must be unlawfully obtained by means of the false pretence, and with the *intent* to cheat and defraud him of the same. *State* v. *Eason*, 86 N. C., 674; *State* v. *Phifer*, 65 N. C., 321; *State* v. *Jones*, 70 N. C., 75.

All of the elements of the crime, we think, are to be found in the facts of this case.

The prosecutor had one hundred and fifty sticks of ton timber in Rock Fish creek; he contracted with the defendant to raft the timber to the mouth of the creek; before any of the timber was rafted by the defendant, he falsely stated that he had rafted three clamps of the timber to the mouth of the creek, and upon that false representation he obtained nine dollars from the prosecutor. When he made the representation, he knew it was false, and it was made for the purpose of obtaining the money from the prosecutor.

But the defendant insisted that the bill of indictment is defective, and moved in arrest of judgment upon the ground that the defendant was not alleged in the bill of indictment to have been employed by the prosecutor or in any way connected with him; that the timber was not alleged to have belonged to the prosecutor; that the defendant represented that he had run the same from Davis' bridge to the mouth of Rock Fish creek for the prosecutor, or under contract with him to do so; or that there

was any obligation on the prosecutor to pay him if the work had really been done; and that the court could not see from the indictment that the representation was calculated to defraud the prosecutor.

It was not necessary that any of these facts should be averred to constitute a good bill of indictment. This bill contains all the essential elements of an indictment for a "false pretence." It sets forth the false pretence of a subsisting fact, the knowledge of the defendant, the negation, the intent to cheat, and that the money of the prosecutor was unlawfully obtained by means of the false pretence. Whether the false pretence was calculated to impose on the prosecutor and induce him to part with his money, or was in fact the means of obtaining his money, were questions that properly belonged to the province of the jury. Russell on Crimes, p. 622 and note on L.

The indictment, in our opinion, is sufficient, and there is no error. Let this be certified to the superior court of Cumberland county that the case may be proceeded with according to law.

No error. Affirmed.

STATE v. GEORGE H. PIPPIN.

Fornication and Adultery—Evidence.

In fornication and adultery, evidence of acts anterior to the two years preceding the finding of the bill of indictment, is competent to be considered by the jury in connection with evidence of other acts of a like nature within the two years.

(*State* v. *Kemp*, 87 N. C. 538, cited and approved).

INDICTMENT for fornication and adultery tried at Fall Term, 1882, of MARTIN Superior Court, before *Gilliam, J.*

The defendants appealed.

Attorney-General, for the State.
Messrs. Pruden & Shaw, for defendants.

SMITH, C. J. The defendants (George H. Pippin and Tabitha Hawkins) are charged with maintaining an illicit sexual intercourse during the two years preceding the finding of the bill of indictment, and, on the trial, to prove the offence, evidence was admitted of their being seen in bed together at a time antecedent to that protected by the statute of limitations.

The court charged the jury that it was competent for them to consider the relations between the parties as subsisting more than two years before the finding of the bill, and the other circumstances in evidence, including the fact that for the past two years and up to the trial they had lived alone in the same house.

To this instruction is directed the only exception relied on and pressed in this court. We find no error in the instruction, and it is fully warranted by the case of *State* v. *Kemp*, 87 N. C., 538. Let this be certified, &c.

No error. Affirmed.

STATE v. JOHN J. CRUMPLER and another.

Highway—Indictment, for obstructing.

An indictment for obstructing "a certain public road and common highway," without specifying its particular location and terminal points, is defective. (*State* v. *Watts*, 10 Ired., 369; *State* v. *Norton*, 1 Winst., 206; *State* v. *Blue*, 84 N. C., 807; *State* v. *Commissioners of Fayetteville*, 2 Mur., 371; *State* v. *Krider*, 78 N. C., 481; *State* v. *Patrick*, 79 N. C., 655; *State* v. *Reese*, 83 N. C., 637, cited and approved).

STATE *v.* CRUMPLER.

INDICTMENT for obstructing a public highway tried at Spring Term, 1882, of SAMPSON Superior Court, before *Gilmer, J.*

Defendants appealed.

Attorney-General, for the State.

Mr. E. T. Boykin, for defendants.

SMITH, C. J. The indictment charges the defendants with having obstructed, by the building of a house thereon, in the county of Sampson, "a certain public road and common highway there situate," without further specification of its location or ascertaining its termini, and the cause comes before us in the form of a special verdict upon which the defendants were adjudged to be guilty and sentenced to pay a fine of one dollar, from which both appeal.

The verdict contains, in separate exhibits, the successive parts of the proceeding had before the board of trustees of the township within which the proposed road lies, copied from the records of the board, which were introduced and upon objection received, which are intended to present the question of their legal sufficiency to establish a public road, from which it appears an appeal was taken from the first action of the board, declaring that it was demanded for the public convenience and ordering a jury to lay it out, by the contesting proprietor of the land over which it was to pass, with a letter from the counsel of the opposing parties to the effect that the appeal would not be prosecuted, bearing date on September 6th, 1869.

The verdict further finds that, in consequence of an understanding between the board and those who were asking for the road, that they would keep up and maintain the road, no overseer had been appointed and put in charge; that, as laid off and used, the road does not pass from one to another public road, but terminates in a private cart-way, three miles from the latter road, to reach which the cart-way must be passed over. The other findings as to the obstruction, it is unnecessary to specify in detail.

While the latter fact as to the ending of the road is expressly found, the record of the action of the jury, also a part of the verdict, shows the contrary, and that the road laid out by them does start from a defined point in "the Clinton and Fayetteville stage-road" and thence proceeding in the direction mentioned, runs "to the road leading from J. D. Parker's, John Fowler's, Micajah Crumpler's, at the corner of Crumpler's fence."

Now, aside from the objection that to some extent the special verdict sets out evidence offered to prove facts, rather than the facts proved, upon which alone can judgment be pronounced, as held in *State* v. *Watts*, 10 Ired, 369, and *State* v. *Norton*, 1 Winst., 206, there is, as we interpret the verdict, a repugnancy between the record and the finding as to the terminal points of the road. We should therefore be constrained to revise the judgment and order the verdict to be set aside, if our review of the case on appeal were to stop here. *State* v. *Blue*, 84 N. C., 807.

But there is, in our opinion, a fatal defect in the bill of indictment, in its vague and indefinite description of the road. It is simply designated as "a public road and common highway" in the county, not distinguished from the many others which traverse different parts of that territory. The rule in reference to criminal prosecutions, which an accused person is called on to answer, requires that the offence should be described with reasonable precision, that he may know what the charge is and be prepared to meet it, and in order, also, to his protection against a second prosecution for the same unlawful act. Accordingly, the forms used in indictments for obstructions put upon highways, or against those whose duty it is to maintain them in repair, for neglect to do so, they are described as running between designated points of a greater or less distance, the one from the other, and the accused is thus informed of the specific imputed offence. Arch. Crim. Plead., 413, 415.

In England it is held that in an indictment against a parish for non-repair of a highway, it is sufficient to describe it as being within the parish (*King* v. *Stoughton*, 2 Saunders, 157, note 7) as

it would seem sufficient to describe the obstructed street, as being within the limits of the town, whose corporate authorities are charged with keeping the streets in order. *State* v. *Commissioners of Fayetteville*, 2 Murp., 371.

But the counties in this state are divided into townships, and these, again, into sections over each of which an overseer is appointed. Acts 1879, ch. 82. And it is manifest an indictment against such overseer must show the road in decay to be within his section, in order to charge him with criminal negligence, or he might be convicted and punished for the default of another. Nor can we see any good reason why an indictment for obstructing a road should not describe it with equal particularity and precision, and we do not discover in the precedents any distinction less favorable to the latter.

In regard to stolen articles and the sufficiency of the terms by which they are described, the cases are numerous, and we refer to but a few in this state. An indictment charging the larceny of "fish," "meat" and "money," before the act of 1876–'77, ch. 68, have been held insufficient in *State* v. *Krider*, 78 N. C., 481; *State* v. *Patrick*, 79 N. C., 655, and *State* v. *Reese*, 83 N. C., 637.

We are, therefore, of opinion that the description of the highway alleged to be obstructed is too vague, and for this defect the judgment must be arrested, and it is so ordered.

PER CURIAM. Judgment arrested.

STATE v. J. O. HOWARD.

Indictment, infant not liable to, for violation of contract.

1. An indictment under the act of 1873–'74, ch. 31, for disposing of crops under mortgage cannot be sustained, where it appears that the defendant is an infant. The alleged disposition was a disaffirmance of the contract and renders it void.

2. Though the act creating the misdemeanor, by its general terms, makes the defendant indictable for a violation of his contract, yet its operation is restricted by the common law which exempts him from the contract by reason of his infancy.

(*Freeman* v. *Bridger*, 4 Jones, 1; *Skinner* v. *Maxwell*, 66 N. C., 45, cited and approved).

INDICTMENT for misdemeanor tried at Fall Term, 1882, of PENDER Superior Court, before *Gilmer, J.*

The indictment was preferred under the act of 1873–'74, ch. 31, for disposing of crops at the time under the lien of a mortgage, given by the defendant to the prosecutor to secure advances.

It was admitted that at the date of the mortgage, and at the date of the alleged disposition and use of the corn raised by the defendant and under the lien of said mortgage, and also at the date of the indictment, the defendant was under the age of twenty-one years. There was no evidence of any ratification by the defendant of the mortgage after he arrived at full age.

The defendant asked the court to instruct the jury that the contract of the defendant being voidable, and the alleged removal occurring while he was still an infant, he was entitled to a verdict of not guilty. His Honor refused to give the instruction, and the defendant excepted. Verdict of guilty; judgment; appeal by defendant.

Attorney-General, for the State.

No counsel for defendant.

ASHE, J. It is well settled that an infant can make no binding contract except for necessaries, which include such things as his meat, drink, apparel, physic, nursing while sick, schooling, &c. But we have yet to find an authority for holding, that the business of farming falls within the exception to the exemption of an infant upon his contracts. Parsons in his work on Contracts (Vol. 1, page 313) says, an infant cannot enter into con-

tracts of business and trade, "for this," he says, "is not necessary and might expose him to the misfortune of entering upon adult life with the burdens of bankruptcy resting upon him."

In *Freeman* v. *Bridger*, 4 Jones, 1, which was an action brought against an infant to recover the value of timber furnished him to build a house on his land, it was held it was not a *necessary*. PEARSON, C. J., who spoke for the court, said: "If the infant was bound to pay for the timber, he must pay for the nails, glass, &c., the wages of the workmen; in other words, for the whole house; and if this be so on the ground that it is necessary for him to have a house to live in, it follows that he must pay for a horse, a plough, a wagon, &c., because such things are necessary to enable him to cultivate his land; then would follow a few cattle and hogs; so the result would be to make the exception broader than the general rule, and take from infants that protection which the law considers they stand in need of by reason of their want of discretion."

The contract in this case then, was not for a necessary.

But it is contended that an infant may bind himself upon his contract other than for necessaries, provided he ratifies it when he comes of age; and on the other hand it is held that contracts of an infant are voidable, and such as relate to his person or personal property may be avoided at any time, even before attaining his majority, by an act clearly manifesting this purpose. Parsons, p. 322. In *Skinner* v. *Maxwell*, 66 N. C., 45, it is decided that when an infant purchases a stock of goods for the purpose of trade or merchandise, and to secure the purchase money executes a note and mortgage of the stock of goods, such contract is voidable, and may be disaffirmed by such infant by any act which manifests such purpose.

In this case, the disposition of the mortgaged crop by the infant in violation of the terms of the contract, was to our minds a clear and manifest purpose to disaffirm the contract, and when thus disaffirmed, the contract which before was only voidable becomes absolutely void. The case then results in this—that the state

seeks by this indictment to hold the defendant amenable to the criminal law for the violation of a void contract. With all due respect to the opinion of those who entertain such a proposition, we must say that it seems to us preposterous.

But it may be objected that the contract is only void by reason of the infancy of defendant, and that there is no saving in the act in favor of infants, &c. The act, it is true, is very broad in its terms and contains no saving clause, but it presents a case where there is a concurrence of two laws—the one a statutory provision making the defendant indictable for a violation of his contract, and the other a provision of the common law exempting the defendant by reason of his infancy from the contract, because as to him it was void. "Like two statutory laws," says Bishop, "they may stand well together up to a given point, and then they come in conflict. The rule in this case is that the prior law is not repealed, but at such point the one or the other simply gives way. For example, a statute general in its terms is always to be taken as subject to any exceptions which the common law requires. Then if it creates an offence, it includes neither infants under the age of legal capacity, nor insane persons," &c. Bishop on Statutory Crimes.

From this view of the case, our conclusion is that His Honor erred in refusing to give the instructions asked. This must, therefore, be certified to the superior court of Pender county, that a *venire de novo* may be awarded the defendant.

Error. *Venire de novo.*

STATE v. WILLIAM STATON.

Indictment—Assault with intent to commit rape.

1. The case of *State* v. *Johnston*, 76 N. C., 209, approved, to the effect that an indictment for an assault with intent to commit rape (under Bat. Rev., ch. 32, § 5) is supported by proof that the assault was made upon a female under ten years of age. It is not necessary that the age should be stated in the bill.
2. Such offence is a misdemeanor, and to charge it as a felony, does not raise the grade of the offence.

(*State* v. *Johnston*, 76 N. C., 209; *Slagle*, 82 N. C., 653; *Upchurch*, 9 Ired., 454, cited and approved).

INDICTMENT for an assault with intent to commit rape tried at Fall Term, 1882, of UNION Superior Court, before *Graves, J.*

The indictment is in substance as follows: The jurors, &c., present that Staton, colored, on the first day of October, 1882, with force and arms, &c., in and upon one Julia Edwards, a female, &c., then and there being, violently and feloniously did make an assault, and her, the said Julia, then and there did beat, wound and ill-treat, with intent her, the said Julia, violently and against her will, feloniously to ravish and carnally know, and other wrongs, &c.

Verdict of guilty; motion in arrest of judgment; motion overruled; judgment; appeal by defendant.

Attorney-General, for the State.

No counsel for the defendant.

ASHE, J. The record does not show upon what ground the motion in arrest was made, and we are left to conjecture; but as the evidence offered on the part of the prosecution showed that Julia Edwards, the person upon whom the assault was committed, was an infant under ten years of age, we suppose the ground

of the motion in arrest is the omission in the indictment to state that she was under that age. This ground cannot be maintained.

The defendant is indicted under the third section of chapter 167, of the act of 1868–'69 (Bat. Rev., ch. 32, § 5), which reads: "Every person convicted by due course of law of an assault with intent to commit a rape upon the body of any female, shall be imprisoned in the state's prison, not less than five nor more than fifteen years."

This act has been construed in an elaborate and well considered opinion by Mr. Justice READE, in the case of *State* v. *Johnston*, 76 N. C., 209, in which it is held, that, in an indictment under that statute, the age of the party upon whom the assault is alleged to have been committed need not be stated. He said the third section of the act (the one under consideration) should be construed as if it read as follows: "If any person shall attempt to commit the rape specified in the second section, that is to say, to carnally know a female over ten years of age against her will, or to carnally know and abuse a female under ten years of age, with or against her will, he shall be punished, &c." And his conclusion is that the conviction in that case was proper, although the indictment failed to state the age of the person assaulted, the charge having been supported by proof of an assault to unlawfully and carnally know and abuse a female under ten years of age. We do not know why the solicitor has described the defendant as a person of color, as the statute describing the offence makes no distinction as between races.

It has been so repeatedly decided by this court that the use of the word "felonious" in an indictment for a misdemeanor does not raise the grade of the offence, that we hardly suppose that was one of the grounds of the motion in arrest. Calling a misdemeanor a felony does not make it one. *State* v. *Upchurch*, 9 Ired., 454; *State* v. *Slagle*, 82 N. C., 653.

We are unable to discover any error in the record. This will be certified, &c.

No error. Affirmed.

STATE v. RANCE ROPER.

Indictment—Out-house—Variance.

1. An indictment for burning a house under the act of 1874–'75, ch. 228, which fails to charge the offence as having been *feloniously* done, is defective. The statute makes it a felony.
2. Indictment under Bat. Rev., ch. 32, § 93, for burning an *out-house* used as a store-house, the proof being that it was an old building located at a cross-roads and occupied as a store-house, but not enclosed or used in any way as a dwelling-house; *Held*, a fatal variance. This statute makes the offence a misdemeanor.
3. An out-house is one that belongs to a dwelling-house and is in some respects parcel of the same, and situated within the curtilage.

(*State* v. *Jesse*, 2 Dev. & Bat., 297, cited and approved).

INDICTMENT tried at Fall Term, 1882, of RICHMOND Superior Court, before *Gilmer*, *J.*

The indictment charged the defendant with burning an out-house used as a store-house, in violation of the act of 1874–'75, ch. 228, and is in substance as follows:

The jurors, &c., present that Roper (and others) did unlawfully and maliciously set fire to and burn a certain out-house used as a store-house, being in possession of C. D. Dowd, and the property of John P. Little, with intent thereby to destroy the same and to injure the said Dowd and Little, against the form of the statute, &c.

There was a verdict of guilty, and the defendant moved in arrest of judgment upon the ground that the bill is defective, in that it does not charge the burning to have been *feloniously* done. The motion was overruled; judgment; appeal by defendant.

Attorney-General and *John D. Shaw*, for the State.
Messrs. Burwell, Walker & Tillett, for defendant.

ASHE, J. There were several exceptions taken on the trial by the defendant to the ruling of the court upon points of evidence, but we deem it needless to consider them, as we are of the opinion that the exception to the indictment was well taken, and the judgment should have been arrested.

The charge in the indictment that the defendant *unlawfully* and *maliciously* set fire to an out-house used as a store-house, in possession of Dowd and the property of Little, with intent thereby to destroy the same and injure the said Dowd and Little, shows that the bill was drawn with the intention of charging the defendant with a violation of the act of 1874–'75, ch. 228. The act declares that whosoever shall violate its provisions shall be guilty of a felony, and whenever a felony is charged in an indictment, it is essential that the term *feloniously* should be used, otherwise the offence charged will only be a misdemeanor, however strictly the words of the statute be followed.

In *State* v. *Jesse*, 2 Dev. & Bat., 297, Chief-Justice RUFFIN says the office of the term *felonice* is to describe the offence, and it is a word which cannot be supplied by any paraphrase or word equivalent.

To the same effect is Mr. BISHOP, who suggests "that in drawing the indictment the practitioner should consider whether the offence is a felony or a misdemeanor in his own state; and if the former, according to the practice prevailing in England and in a part of our states, he must not omit to employ the word *feloniously*, though this word should not be found in the statute." Bish. Stat. Crimes, § 452.

The omission to charge the act of burning to have been feloniously done is a fatal defect, and is a good ground for the arrest of the judgment, considering the indictment as preferred under the act of 1874–'75.

To avoid such a result, we have considered whether the indictment might not be sustained under section 93, chapter 32, of Battle's Revisal, which makes it a misdemeanor unlawfully and wilfully to burn any church, uninhabited house, *out-house*, or

other house or building, &c. But we find the state confronted, in that view of the case, with the objection raised on the trial by the defendant, that there is a variance between the description of the property in the indictment and that described in the evidence. The indictment describes it as an *out-house* used as a store-house; and the evidence is that it was a part of an old-building located at a cross-roads, that it was not enclosed or used in any way as a dwelling-house, and was occupied, at the time of the burning, by Dowd as a store-house.

Now, an out-house has a technical meaning. The house occupied by Dowd, as a store, was not an out-house in the meaning of the law. An out-house is one that belongs to a dwelling-house, and is in some respect parcel of such dwelling-house and situated within the curtilage. Such was the meaning of the term at common law, and under the English statutes, similar to ours, in relation to the burning of houses. Russell on Crimes, 1038.

The ends of justice, perhaps, will be better subserved by arresting the judgment, that a new bill may be sent, if the solicitor shall deem it proper to do so.

Error. Judgment arrested.

STATE v. JERE LANIER.

Indictment—Embezzlement.

1. Where an exception is contained in the same clause of the act creating the offence, the indictment must show, negatively, that the defendant does not come within the exception.

2. Hence, an indictment for embezzlement under Bat. Rev., ch. 32, § 16, must aver that the defendant is not an apprentice or within the age of eighteen years; and if drawn under section 136 of same chapter, it must be averred that he is not an apprentice or under the age of sixteen years. Tha latter act makes the offence a felony, punishable as in case of larceny.

(*State* v. *Heaton*, 81 N. C., 542, cited and approved).

STATE *v.* LANIER.

INDICTMENT for embezzlement tried at February Term, 1883, of NEW HANOVER Criminal Court, before *Meares, J.*

The jurors, &c., present that Jere Lanier, &c., on the 17th day of September, 1882, with force and arms, &c., being then and there employed as a servant to Addie P. McClammy, by virtue of his said employment, did then and there and whilst employed as aforesaid, receive and take into his possession certain money, to a large amount, to-wit, to the amount of seven dollars and fifty cents, for and in the name of, and on the account of the said McClammy, his mistress and employer, and the said money then and there fraudulently and feloniously did embezzle; and so the jurors, &c., do say, that Lanier, in manner and form aforesaid, the said money, the property of his said mistress and employer, from the said McClammy, did steal, take and carry away, against the form of the statute, &c.

The facts stated in the case are not material to the point decided by this court. Verdict of guilty, motion in arrest of judgment, motion overruled, and the defendant appealed from the judgment pronounced.

Attorney-General, for the State.

No counsel for the defendant.

ASHE, J. There are two statutes in this state upon the subject of embezzlement. The one is to be found in Battle's Revisal, ch. 32, § 16, where the offence is made a misdemeanor, and the other, in section 136 of the same chapter, where it is made a felony. The latter is the act of 1871–'72, ch. 145, § 1, and in the following words:

"If any officer, agent, clerk or servant of any corporation, or any clerk, agent or servant of any person or corporation (except apprentices and other persons under the age of sixteen years) shall embezzle or fraudulently convert to his own use, or shall take, make way with, or secrete with intent to embezzle or fraudulently convert to his own use any money, goods or other chattels, bank-note, check or order for the payment of money, issued

by or drawn on any bank or other corporation, or any treasury warrant, treasury note, bond or obligation for the payment of money issued by the United States or by any state, or any other valuable security whatever, belonging to any other person or corporation, which shall have come into his possession or his care, by virtue of such office or employment, he shall be deemed guilty of felony, and upon conviction thereof shall be punished as in case of larceny."

The defendant's counsel moved in arrest of judgment upon several grounds, one of which was that the bill of indictment does not allege that the defendant is not within the age of eighteen years. The counsel evidently mistook the act under which the bill of indictment was intended to be drawn. It is section 16, chapter 32, in which the exception is made of persons under the age of eighteen years; but the indictment is for a felony, and must therefore fall under section 136, and the exception there is of persons under sixteen years of age. But it can make no difference, for the indictment is defective, whether prepared under either act.

The rule is well established, if there be an exception contained in the same clause of the act which creates the offence, the indictment must show, negatively, that the defendant or the subject of the indictment does not come within the exception. Arch. Cr. Pl., 53; *State* v. *Heaton*, 81 N. C., 542. Far this defect in the indictment, the judgment should have been arrested.

As a new bill of indictment will perhaps be prepared against the defendant, we would suggest that the draftsman look somewhat particularly into the difference between our act of 1871–'72, and the act of 7th and 8th GEORGE IV., ch. 29, § 4, under which the indictment was framed, which was used as a precedent in this case. The English statute declares embezzlement to be larceny, but ours only makes it a felony, punishable as larceny.

There is error in the refusal of the judge to grant the motion in arrest of judgment.

Error. Reversed.

STATE v. H. E. BARNARD.

Injury to stock in enclosure not surrounded by lawful fence—Carelessness supplies the place of criminal intent, when.

On trial of an indictment for killing another's stock in the defendant's enclosure, not surrounded by a lawful fence, it appeared that the defendant recklessly shot at cattle in his corn field, to frighten and run them out, and killed the prosecutor's mule, which at the time he did not see, the corn being very high; *Held*, that he is criminally responsible. The carelessness with which the act was done supplies the place of criminal intent, whether the defendant had license from the owner of the cattle to shoot at them, or not.

INDICTMENT for misdemeanor tried at Spring Term, 1883, of BUNCOMBE Superior Court, before *Avery, J.*

The defendant is charged with killing a mule, the property of M. J. Fagg, in violation of section 95, chapter 32 of Battle's Revisal, which provides that if any person shall kill or abuse any horse, mule, &c., the property of another, in an enclosure not surrounded by a lawful fence, such person shall be guilty of a misdemeanor, and on conviction shall be fined or imprisoned at the discretion of the court.

It was proved and admitted that the mule was killed, as charged, in an enclosure not surrounded by a lawful fence.

The defendant testified in his own behalf, that on the morning mentioned by the state's witnesses he was informed that Fagg's mules were in his corn, but being unwell he refused then to get out of bed; that soon after, hearing his daughter hallooing at cattle in his field, he arose, got his gun, and went into the field; that the corn was very high; he saw his daughter running some cattle out, and he shot at them, but did not see the mule when he fired, nor shoot at it, and did not know the mule was wounded until he went to the town of Asheville on the same day; that the cattle were running very fast across the corn rows, and he shot

down the rows, and after shooting, he discovered that the cattle belonged to one Patton, who had a slaughter-pen on the opposite side of the road.

With the view of corroborating the defendant by Burnett, and sustaining the position taken by his counsel that if he shot at Patton's cattle and hit Fagg's mule, he could not be convicted, the defendant proposed to prove that soon after he shot he went to said Burnett, mistaking him for Patton, the owner of the cattle, and told him he had shot at his cattle.

It was also proposed to prove by the defendant that he had permission from his brother and one Pope, whose cattle had frequently broken into his field, to shoot at the cattle in order to keep them out, and when he shot at Patton's cattle he thought they were either the cattle of his brother or of Pope. This was offered with the view of insisting that if defendant shot at Patton's cattle, mistaking them for the cattle whose owners had given him license to shoot at them in his field, and in so doing he killed the mule, he could not be convicted under this bill of indictment. But the court refused to admit evidence, as well as that in regard to the conversation with Burnett, and the defendant excepted.

The defendant's counsel asked for the following instructions:

1. That if defendant had license from his brother and Pope to shoot at their cattle, when in his enclosure, and shot at Patton's cattle by mistake, and in so shooting killed the prosecutor's mule, without knowing it, the defendant would not be guilty.

2. If defendant shot at Patton's cattle, though that shooting was unlawful, and, without any purpose or knowledge, hit and killed the prosecutor's mule, the killing would not be willful, and the defendant would not be guilty.

The instructions were refused, and the defendant excepted. Verdict of guilty; judgment; appeal by the defendant.

Attorney-General, for the State.

Messrs. Davidson & Martin, for defendant.

ASHE, J. We are of the opinion, in view of the facts as proved and admitted by the defendant himself, there is no error in the refusal to give the instructions asked, or to admit the evidence upon which they were predicated.

It is a general rule of the common law, which applies as well to indictments under statutes, that to constitute a crime there must be a criminal intent; and it is also a maxim of the law, that every man is presumed to intend the consequences of his acts. It is upon this principle that whenever a man commits an act unlawful at the common law or made so by statute, the criminal intent is presumed. It is a principle which applies to all violations of the criminal law: if, for example, a man is indicted for murder, and there is no other proof than the act of killing, the law presumes the act to be done intentionally and with malice, and pronounces it murder; yet if it is but a presumption, it may be rebutted by showing the act was committed upon sudden provocation, in self-defence, or under circumstances which gave him a reasonable cause to believe the existence of facts which excuse the act, although they do not really exist; but if so misled, he acts as he would be justified in doing were the facts what he believed them to be, he is legally innocent, provided the acts were done without any *fault or carelessness* on his part. Bishop Crim. Law, § 383. The grounds of belief must be reasonable, and the acts must be performed without fault or carelessness. "There is," says the same author in section 389, "little distinction, except in degree, between a positive will to do a wrong and an indifference whether wrong is done or not: on this ground carelessness is criminal, and within limits supplies the place of direct criminal intent." By way of illustration, for example: If a person by *careless* and furious driving unintentionally run over another and kill him, it will be manslaughter; if a person in command of a steamboat by *negligence or carelessness* unintentionally run down a boat and the person in it is thereby drowned, he is guilty of manslaugter. *Ibid.*

So, if workmen throw stones, rubbish, or other things from a house, in the ordinary course of their business, by which a person underneath is killed, if they look out and give timely warning beforehand to those below, it will be accidental death; if without such caution, it will amount to manslaughter, at least. It was a lawful act, but done in an improper manner. Foster, C. L., 262. "It is not sufficient," says the same author, "that the act from which death ensueth be lawful or innocent: it must be done in a proper manner and with due *caution* to prevent mischief." And Mr. BISHOP says (§ 389) this doctrine of negligence producing death, is only one of the illustrations of the broader doctrine of carelessness. It pervades the criminal law in all its apartments, applying to all defences where there is room for its application.

We can see no reason why the principle does not apply to this case. The defendant, on the morning of the day of the shooting, was informed that Fagg's mules were in his corn, and soon after, hearing his daughter hallooing at cattle, he took his gun and went into his corn field. The corn was very high, and the cattle were running very fast across the corn-rows, and without waiting to see and ascertain whose cattle they were, he fired at them and killed the prosecutor's mule.

The defendant, in justification of the act, proposed to prove that his brother and one Pope, whose cattle had been in the habit of getting into his corn, had given him license to shoot their cattle, and when he shot at them he believed they were their cattle. Even if the testimony had been admitted, we do not perceive how it could have availed the defendant; for they were, in fact, the cattle of one Patton, and if, under the circumstances, he had shot one of his cows instead of Fagg's mule, it would have been an act of such carelessness as to have rendered the defendant criminally responsible, because he did not take any precaution to ascertain whether they were the cattle of his brother or Pope, but rashly and recklessly fired upon them. And when by his blind and indiscriminate firing at the cattle he shot the mule, his act

was the more criminally careless, because he knew or had reason to believe that the mule was in the corn, and probably in the very crowd of cattle at which he shot, although he says he did not see the mule when he fired.

Conceding that the defendant had the legal right to shoot at the cattle of his brother and Pope, and he believed at the time that they were their cattle, his conduct was such as, in our opinion, manifested not only a culpaple indifference to the consequences of his act, but such a degree of carelessness as, in contemplation of law, supplied the place of criminal intent.

There is no error. Let this be certified, &c.

No error. Affirmed.

STATE v. S. JENNETT.

Larceny—Presumptions—Recent Possession.

1. Where the defendant is apprehended *immediately* after the larceny, with the stolen goods in his possession, it is a *violent* presumption of his having stolen them, and the court should instruct the jury that, *in law*, he is guilty.
2. Where he is found in possession some time after the larceny, and refuses to account therefor, it is a *probable* presumption, and a question of fact for the jury.
3. But where he is not found in possession recently after the loss (here eighteen months), it is a *light or rash* presumption, and not sufficient to warrant conviction, unless the attending circumstances tend to implicate the defendant in the larceny, as where he makes false statements in respect to his possession.

(*State* v. *Rights*, 82 N. C., 675, cited and approved).

INDICTMENT for a larceny tried at Fall Term, 1882, of WASHINGTON Superior Court, before *Gilliam, J.*

Attorney-General, for the State.
No counsel for the defendant.

ASHE, J. The "case on appeal" is so imperfect, that, in order to arrive at the facts, we are under the necessity of relying on conjecture, rather than upon His Honor's statement. Supposing that it was a case of clerical misprision, a *certiorari* was sent down for a more perfect record, but the same statement is returned to us.

The statement shows that on the 31st of January, 1881, the prosecutor, Davenport, "had a black dress-coat stolen from him in Plymouth, and that on the —— day of August, 1882." "That it was made by a merchant-tailor to order; that the defendant lived in the town and was often in Davenport's store."

The state having rested its case upon proof of these facts, the defendant asked the court to withdraw from the jury the evidence of possession by defendant of the property alleged to have been stolen, and to instruct them that there was no evidence connecting him with the larceny. The court declined to give the instruction, and the defendant excepted. There was a verdict of guilty, and the defendant appealed from the judgment pronounced.

The "case" does not state that the coat was found in the possession of the defendant, but we must infer that it was so found, from the fact that the defendant asked His Honor to withdraw the evidence of possession from the jury; otherwise the record would show that he had been convicted upon no other evidence than that the coat was stolen, and was made to order by a merchant-tailor, and the defendant was often in the store of the prosecutor. But assuming, as we must, that the coat was found in the possession of the defendant, we must infer from the defective statement that it was found in his possession in August, 1882.

Taking the case then to be, that the coat was the property of the prosecutor; that it was stolen from him in January, 1881; that it was found in the possession of the defendant in August, 1882; and that he lived in the town of Plymouth, and was often in the store of the prosecutor; does such a state of facts warrant the conviction of the defendant? We think it does not.

The state relies upon the fact of the stolen property being found in the defendant's possession, as raising a presumption that he is the thief. "Presumptions," says Mr. ARCHBOLD, "are of three kinds: violent presumptions, where the facts and circumstances proved *necessarily* attend the fact proved; probable presumptions, where the facts and circumstances proved *usually* attend the fact proved; and light or rash presumptions, which, however, have no weight or validity at all." He thus illustrates the distinction: "Upon an indictment for stealing in a dwelling-house, if the defendant were apprehended a few yards from the outer door, with the stolen goods in his possession, it must be a violent presumption of his having stolen them. But if they were found in his lodgings some time after the larceny, and he refused to account for his possession of them, this, together with proof of their having been stolen, would amount, not to a violent, but to a probable presumption merely. But if the property was not found recently after the loss, as, for instance, not until sixteen months after, it would be but a light or rash presumption, and entitled to no weight"; and for this latter position he cites the case of *Rex.* v. ———, 2 C. &. P., 459, where it was held that the possession of stolen goods, sixteen months after the loss, was not of itself sufficient to warrant a conviction of the defendant. See also, *State* v. *Rights*, 82 N. C., 675.

Where the presumption is violent, the court should instruct the jury that, *in law*, the defendant is guilty.

Where it is only a probable presumption, it is a question of fact for the jury.

But where it is a light or rash presumption, the court should instruct the jury that the evidence is insufficient to warrant the conviction of the defendant; but this must be taken with the qualification, that there are no attending circumstances which, in connection with the possession of the stolen property, tend to implicate the defendant in the larceny, as for instance, where he gives false statements as to the means by which he acquired the possession.

We are of the opinion, under the facts of this case as we suppose them to be, that it was the duty of His Honor to have instructed the jury that the evidence was not sufficient to warrant them in the conviction of the defendant. There is error.

Error. *Venire de novo.*

STATE v. JOHN OATES and another.

Peace Warrant, proceedings under.

1. A peace warrant is a criminal action prosecuted by the state, at the instance of an individual, to prevent an apprehended crime against his person or property, and is placed by the act of 1879, ch. 92, within the exclusive jurisdiction of a justice of the peace.
2. Where, in such case, the condition of a recognizance, in the sum of $300, was broken, *it was held* to be competent for the justice to declare the same to be forfeited and order it to be prosecuted in the court having jurisdiction of the penal sum. Bat. Rev., ch. 33, §§ 103, 106.

(*State* v. *Locust*, 63 N. C., 574, cited and approved).

MOTION to dismiss the proceeding for want of jurisdiction, heard at January Special Term, 1882, of SAMPSON Superior Court, before *McKoy, J.*

The defendant, Oates, was arrested in February, 1881, by virtue of a peace warrant issued by a justice of the peace, and upon an investigation of the matters charged therein, he was required to enter into a recognizance in the sum of three hundred dollars, with condition to keep the peace for six months towards all the citizens of the state, and especially towards William E. Stevens, the complainant, which recognizance was entered into with James H. Pugh, the other defendant, as surety.

On the 7th of November, 1881, a notice in the nature of a *scire facias* was issued by said justice to the sheriff,—reciting the

warrant, the order thereon, the recognizance, and the fact that on April 9th, and while the recognizance was in force, the defendant, Oates, had been convicted before one Hubbard, a justice of the peace, of an assault and battery upon one Washington Stevens,—commanding him to make known to the said Oates and Pugh, that they personally appear before him at his office in Clinton, on the 17th of November, 1881, then and there to show cause why the recognizance should not be declared to be forfeited.

The defendants failed to appear as required, and thereupon the recognizance was adjudged by the justice to be forfeited, and that it be prosecuted according to law. From this judgment the defendant appealed to the superior court. His Honor affirmed the ruling of the justice, and the defendants appealed to this court, assigning as grounds therefor that the justice had no jurisdiction of the action, because the bond was for a sum above two hundred dollars.

Attorney-General and *E. T. Boykin*, for the State.
No counsel for defendants.

ASHE, J. The defendants' appeal seems to be founded upon the idea that this was a civil action, and the jurisdiction of the justice was restricted by the constitution to two hundred dollars. That is so, if it is a civil action. The constitution gives to justices of the peace, under such regulations as the general assembly shall prescribe, jurisdiction of civil actions founded on contract, wherein the sum demanded shall not exceed two hundred dollars. Art. IV, § 27. But this is not a civil action. It is an action prosecuted by the state, at the instance of an individual, to prevent an apprehended crime against his person or property (Bat. Rev., ch. 17, § 5, sub.-sec. 2), and this provision of the Code has had a construction given it by this court in the case of *State* v. *Locust*, 63 N. C., 574, where it was held that a proceeding upon a peace warrant was a *criminal action*.

Actions by the Code are divided to two kinds—civil and criminal. A criminal action is, 1. An action prosecuted by the state, as a party, against a person charged with a public offence for the punishment thereof; and 2. An action prosecuted by the state, at the instance of an individual, to prevent an apprehended crime against his person or property. Every other is a civil action. Bat. Rev., ch. 17, § 6. The distinction between criminal actions is founded upon the difference, whether it is a proceeding for a public offence, in nature of an indictment for a misdemeanor, or to prevent (as this case for example) a threatened crime against a private person. In the former case, the constitution has restricted the jurisdiction of justices, by declaring that a justice should have jurisdiction of all criminal matters arising within their counties, where the punishment cannot exceed a fine of fifty dollars or imprisonment for thirty days. Art. IV, § 27. This provision was evidently intended to limit the jurisdiction of justices in criminal actions in nature of indictment, where final jurisdiction was given them. But we do not think it has any application to criminal actions of the second kind, which affect only private rights. This action is left by the constitution to be regulated by the legislature; and it has been regulated by the acts of 1868–'69, ch. 178, and of 1879, ch. 92. The latter act gives to justices of the peace exclusive original jurisdiction of peace warrants and proceedings thereunder, and contains no repealing clause. The former act provides that justices of the peace may take recognizances to keep the peace, in any sum not exceeding one thousand dollars, and prescribes the proceedings to be had to enforce the same. Those provisions of the act that are not inconsistent with the exclusive jurisdiction given by the act of 1879, are not repealed; therefore, sub-chapter 2, section 10 of the act (Bat. Rev., ch. 33, § 103) is still in force, which provides that "every person, who shall have entered into a recognizance to keep the peace, shall appear according to the obligation thereof; and if he fail to appear, the

court shall forfeit his recognizance and order it to be prosecuted, unless reasonable excuse for his default be given."

The justice of the peace, in the case before us, has strictly followed this provision of the statute. The recognizance imposed upon the defendants the duty to appear before the justice and show cause whenever he should notify them to appear before him to answer the alleged breach of the conditions of the recognizance, and in default thereof, the law required the justice to declare the forfeiture.

There is no error. Let this be certified to the superior court of Sampson county, that that court may certify to the justice's court to the end that the case may be proceeded with according to law.

No error. Affirmed.

STATE v. HENRY JONES.

Plea in Abatement—Quashing—Jurors, standing aside—Justice's Warrant—Jurisdiction—Homicide—Officer, when protected by warrant—Special Deputy.

1. A plea in abatement, or a motion to quash, after plea of "not guilty" entered, is only allowed at the discretion of the court.
2. The standing aside jurors to the end of the panel, in the trial of capital felonies, where the prisoner's challenges are not exhausted before the "jurors stood aside" are tendered, is the recognized practice in this state.
3. A justice's warrant for larceny, which describes the offence with sufficient precision to apprize the accused of the charge, is good, though defective in form, and will protect the officer who executes it.
4. But in cases determinable before a justice, the warrant is the "indictment," and must set out the facts constituting the offence with certainty.
5. A regular officer is bound to obey a warrant directed to him, if it is for an offence within the jurisdiction of the justice (either to bind over or try

the party); and a special officer is equally protected by the law when he executes such warrant, though not bound to obey it, nor sworn as a regular officer.

6. The prisoner, under the circumstances of this case, is guilty of murder in slaying the officer specially appointed to execute the warrant, the same being read to the prisoner, who was also informed that the arrest was made under its authority.

(*State* v. *Eason*, 70 N. C., 88; *State* v. *Benton*, 2 Dev. & Bat., 196; *State* v. *Bryson*, 84 N. C., 780; *State* v. *Hawes*, 65 N. C., 301, cited and approved).

INDICTMENT for murder tried at Spring Term, 1882, of WAKE Superior Court, before *Bennett, J.*

On the 17th of February, 1882, the bill of indictment was returned into court, "a true bill," by the grand jury, and on the next day, in the absence of one of the prisoner's counsel and before either of his counsel, assigned at the time of prisoner's arraignment, had an opportunity to examine the record, the prisoner was arraigned and pleaded not guilty—one of his counsel who was present, not asking for time—and the case was set for trial on the first day of March, 1882, when the prisoner, through his counsel, moved to be allowed to withdraw his plea of not guilty, and to enter a plea in abatement. This was refused by the court for reason that the grand jury had been detained a week for any motion to be made in the case, and if this motion had been made in the interval, between the arraignment and the discharge of the grand jury, it would have been allowed; but none having been made and the grand jury being discharged, the motion could not be allowed. Prisoner excepted.

Counsel then moved to quash the bill upon several grounds, which was disallowed, and the prisoner excepted.

In forming the jury, the regular venire having been exhausted, the court ordered several special venires of talesmen to be summoned—1. fifty; 2. twenty-four; 3. twelve—and during the call of the first, the solicitor was allowed to stand aside three jurors until the whole number, then in the box, was drawn and

tendered; on the call of the second, one juror was stood aside until the panel was exhausted. The prisoner excepted to the ruling of the court.

There was much evidence introduced by the state, substantially as follows: On the 14th of February, 1882, the deceased, A. H. Blake, accompanied by John Q. Watkins, arrested the prisoner by virtue of a state's warrant which Blake was specially authorized to execute. The warrant was read to the prisoner by Blake, who told him that he arrested him under its authority, which was as follows:

"Burwell Freeman, being sworn, complains on oath to H. Watkins, one of the justices of the peace of said county, that Henry Jones did, on the 31st of January, 1882, steal, take and carry away one ox belonging to the said Burwell Freeman, and this complainant further says, that said Henry Jones did maliciously commit the said offence, and he prays that a proper warrant issue, to the end that the person accused be brought before a magistrate to be dealt with according to law." (Signed by Freeman, and sworn to before the justice on the 13th of February, 1882).

"State
v.
Henry Jones, } Warrant for Larceny.

To any constable or other lawful officer of Wake county:

Whereas, complaint has been made before me this day, on the oath of Burwell Freeman, that Henry Jones did, on the 31st day of January, 1882, with force and arms, at and in the county aforesaid, steal, take and carry away one ox, against the peace and dignity of the state: These are, therefore, to command you to forthwith apprehend the said Henry Jones, and have him before me, at my house, then and there to answer the said charge, and be dealt with according to law. Given under my hand and seal, this the 13th of February, 1882." (Signed by the justice).

Endorsed as follows: "For the lack of an officer, I hereby deputize A. H. Blake to serve the within warrant." (Signed by the justice).

After the prisoner's arrest, while going to a neighbor's house, not far distant from the prisoner's house, he attempted to make his escape by flight. The deceased ordered him to stop; he ran and was pursued by deceased about four hundred yards; the deceased fired at him three pistol shots, but without effect; prisoner was overtaken and they went with him to his house; on arriving there, the prisoner went in and put on his Sunday clothes, and then went in the kitchen to eat his breakfast, and afterwards came out and took a chair and sat down in the door of the house, with his head down. Blake told him they must go, as the trial was at nine o'clock, and prisoner said he was not going until Henrietta (his wife) came, if it was a month. Blake then sent John Watkins to a store, not far distant, for help. When Watkins left, the deceased was sitting on a stump about thirty feet from the house, holding a pistol in each hand, uncocked, with the muzzles towards the ground, the same exhibited on the trial.

The report of a gun was heard in the direction of prisoner's house, about a half hour after Blake shot at prisoner. Upon the return of Watkins, and one Peebles who came with him, to the aid of Blake, he was found lying dead (shot in the eyes and head) about six feet directly in front of the house and eight feet from a crack in the house near the door. The crack was about twelve inches long and about three-quarters of an inch wide, one of the logs of the house being powder-soiled and torn with shot. About thirty feet from the house there was a dogwood tree, the bark of which was freshly torn with shot; and the deceased was lying in a direct line between the house and the tree.

The door of the house was open when Watkins left to go to the store, but when he returned it was shut and the prisoner gone, and there were no pistols about the body of the deceased. Upon entering the house, a musket was found in one of the corners, bearing signs of having been recently fired, and the

smell of gunpowder was perceptible in the house, as soon as the door was opened. There were no signs about the house of pistol balls having been fired into it, or inside of it.

While under arrest, the prisoner said if he got clear some one would have to die; and while in jail, when asked by the justice who issued the warrant, why he had done as he did, his reply was, "nothing but meanness."

There was evidence that on the morning after the homicide a horse belonging to one of the neighbors was missing, which evidence was objected to by prisoner, but allowed by the court. The horse was found a day or two afterwards at Enfield in Halifax county, when the prisoner was arrested, and the two pistols, belonging to deceased, found loaded in his possession.

While the prisoner was under arrest, on his re-capture and return to Raleigh, he said he did not think the deceased had the right to arrest him, that he did not wish to be taken, that deceased shot at him twice, and he fired at deceased and hit him in the face, and that he was in the house when he shot the deceased.

The counsel for prisoner asked for the following special instructions:

1. The particularity required in indictments cannot be dispensed with in warrants, and if a justice issue a warrant which does not on its face contain all the charge, and all the circumstances essential to its legal form and constitution, in charging a criminal offence, such a warrant is void.

2. An officer acting under a void warrant is a trespasser, and must take notice of its character at his peril; and if he, in executing it, kill the prisoner with a deadly weapon, the fact that prisoner was attempting to make his escape by flight only, is no justification, and the killing is murder.

3. An officer acting under such warrant, or one which on its face does not charge any criminal offence for which the prisoner could be held for trial or punished, is bound to take notice of such defects at his peril; and if prisoner is not armed and not

in actual resistance, and attempts to escape by flight only, and under such circumstances the officer shoots and discharges a pistol three or more times at prisoner, the officer, by the excessive force used and wanton abuse of authority, forfeits his rights to protection as an officer; and the prisoner may, if he has reasonable apprehension that great bodily harm will be done him by such officer, slay the officer, and the killing will be manslaughter, at most.

4. If a warrant is void, it affords no protection to the officer attempting to execute it, and if its execution is resisted by the prisoner, he is guilty of no offence against the law, though in doing so the person of the officer is assaulted.

5. No officer has the right to slay a prisoner, for attempting to escape by flight only, except in capital felonies.

6. If an officer for no other cause than the flight, the warrant being void and the crime charged not a capital felony, shoot at prisoner several times with a pistol, and prisoner kill him through reasonable fear, it is manslaughter; whether the fear was reasonable or not is a question for the jury, and they must put themselves in the shoes of the prisoner and consider all the circumstances at the time of the killing.

7. If, in this case, the deceased by shooting at the prisoner caused him, through fear, alarm or cowardice, to be under the impression that great bodily harm was about to be done to him, and under such impression he killed the deceased, he would not be guilty of murder or manslaughter.

8. Or if the deceased by shooting at prisoner several times, he being under arrest under a void warrant, and he did nothing but attempt to escape by flight, caused the prisoner to be under the impression or belief, which was caused by the fear, alarm or cowardice put in operation by the shooting, that great bodily harm was about to be done him, and under such impression or belief he killed the deceased, he is only guilty of manslaughter.

9. The reasonableness of such impression or belief is not that of the jury, but of the prisoner.

10. That to constitute Blake, the deceased, a lawful officer, he must have been sworn.

11. If Blake was not a known officer, he must have shown his authority to act.

12. That his authority was not shown by what he declared, but the authority which he has, is his justification.

13. If prisoner did not know Blake was an officer, and he was not a known officer and did not show his authority, the prisoner is not guilty of murder.

14. To justify the killing of a felon for the purpose of arresting him, the slayer must not only show a felony actually committed, but also that he avowed his object to arrest and the felon refused to submit.

15. If the jury should find from the evidence that deceased was, at the time of the fatal shot (if they find that prisoner fired it), maliciously or unlawfully committing an assault upon the prisoner with a deadly weapon, and the prisoner had reasonable ground to believe that his life was in danger, or that he was to be subjected to serious bodily harm, the prisoner is not guilty.

16. If at the time the prisoner fired the fatal shot (if the jury find he did fire it) he did not know and deceased had not made known to him that he was an officer, and the deceased was not in fact legally authorized to arrest him, the prisoner is guilty of manslaughter at most.

17. If the prisoner believed and had reason to believe, that although the deceased did not intend to take his life, yet did intend and was about to do him some enormous bodily harm, such as maim for example, and under this reasonable belief he killed the deceased, the offence is homicide *se defendendo*, and excusable.

18. If deceased was acting under a void warrant, and it did not appear that the occasion was an extraordinary one, he was not in any sense an officer.

19. If the warrant is void, the appointment is void.

20. An officer has the right to refuse to execute any warrant, precept or mandate, which is void on its face.

His Honor refused to give the instructions, and proceeded to give his charge to the jury at considerable length, which was excepted to by the prisoner's counsel, but they failed to specify any ground of error.

The prisoner was found guilty of murder, and appealed from the judgment of the court.

Attorney-General, for the State.

Messrs. W. H. Bledsoe and *C. K. Lewis*, for prisoner.

ASHE, J. We have carefully perused and considered the charge given by the judge to the jury, and have been unable to discover any error. The principles of law, applicable to the facts of the case, were fairly and fully expounded by him, and left no ground of complaint on the part of the prisoner. Nor have we been able to detect any error in his refusal to give the several special instructions asked by the prisoner, nor in his refusal to permit the prisoner to file a plea in abatement, or to entertain his motion to quash the indictment.

Whether a plea in abatement shall be allowed, or a motion to quash entertained, after the plea of "not guilty" has been entered, are matters addressed entirely to the discretion of the court. Any special matter in abatement must be pleaded at the time of arraignment, before the plea of "not guilty," (Arch. Cr. Pl., 78 a), and motions to quash after plea are only allowed at the discretion of the court. *State* v. *Eason*, 70 N. C., 88.

The exception taken on the trial to the ruling of the court in permitting the solicitor to stand aside jurors until the panel was exhausted, cannot be sustained. It is a practice which has long prevailed in our courts, in the trial of capital cases, and has been held to be no ground of exception, where it has been reasonably exercised by the court, and the prisoner's challenges have not been exhausted before the "jurors stood aside" have been ten-

dered. *State* v. *Benton*, 2 Dev. & Bat., 196. Here, there were not more than three jurors made to stand aside from either panel, and the prisoner's challenges were never exhausted.

We are of opinion His Honor committed no error in his refusal to give the instructions prayed for. Upon the evidence in the case, he would not have been warranted in giving those instructions. The first, second, third, fourth, fifth, sixth, eighth, sixteenth, eighteenth, nineteenth and twentieth instructions asked are predicated upon the assumption that the warrant under which the arrest was made is void. But is it void? This is the hinge upon which the case turns.

It is insisted by prisoner's counsel, that the same particularity is required in warrants issued by justices of the peace as in indictments; and that the warrant, under which the prisoner was arrested, is defective in omitting the word "felonious," and in not alleging the ownership of the property charged to have been stolen. These would certainly have been fatal defects in a bill of indictment for larceny. But, in warrants, the law does not require the same particularity as in indictments; and although a warrant may be defective in form, or not strictly legal, if it is for an offence within the jurisdiction of the justice, the officer to whom it is directed, if a regular officer, is bound to obey it, and if a special officer, who, though not bound to obey, yet undertakes to execute it, they are equally protected by the law.

In 1 Hale P. C., 460, it is laid down, "that although the warrant of the justice be not in strictness lawful, as if it express not the cause particularly enough, yet, if the matter be within his jurisdiction as justice of the peace, the killing of such officer, in execution of his warrant, is murder; for in such case, the officer cannot dispute the validity of the warrant."

This passage of HALE was cited with approval by Judge LUMPKIN of the supreme court of Georgia, in *Boyd's case*, 17 Ga., 194, where a similar objection was made to a warrant as in this case. The court say: "If this be law, and who will doubt its reasonableness, it is decisive of this exception. It would be

monstrous to lay down a different rule. It would put in jeopardy the life of every officer in the land. It never could be intended that they should determine, at their peril, the strict legal sufficiency of every precept placed in their hands." See also, 2 Hale, 111; *King* v. *Wilkes*, 2 Wil. Rep., 151; and *Rex* v. *McCulley*, 9 Coke Rep., 117, where it was resolved by all the judges, met in conference upon the record of conviction in that case, that if there be error in awarding process, or in the mistake of one process for another, and an officer be slain in the execution thereof, the offender shall not have the advantage of such error, but that the resisting the officer, as he comes in the King's name, is murder."

In Chitty's Criminal Law, 41, we find the doctrine thus stated: "It does not seem to be necessary to set out the charge, or offence, or evidence, in a warrant to apprehend, though it is necessary in the commitment; and it has been observed that cases may occur in which it would be improvident to let even the peace officer know the crime of which the party to be arrested is accused." From this it will be seen, that more particularity and certainty in the description of the crime charged are required in commitments than in warrants; yet it is held, that though in a commitment for felony it was necessary that it should specify the species of felony, as for felony for the death of J. S., or for burglary, "it was not necessary to allege in the *mittimus* that the offence was 'feloniously' committed."

In *Rex* v. *Croker*, 2 Chitty, 138, the defendant was committed for embezzling bank notes; the warrant did not state that the act was done "feloniously," and it was therefore claimed that the defendant was entitled to his discharge. But the court said, a commitment need not have the precision of an indictment. The commitment states general evidence, and though not formally sufficient to find him guilty, yet it is sufficient if the *corpus delicti* be shown to us to warrant the conviction.

The conclusion that we deduce from the authorities is, if the warrant is for an offence within the jurisdiction of the justice, and the crime charged is described with sufficient precision to

apprize the accused of the offence with which he is charged, the warrant is good and will protect the officer. But this applies only to those cases where the justice acts ministerially, as in warrants to arrest offenders where he has no final jurisdiction. Where he takes cognizance of criminal actions within his jurisdiction, the warrant is "the indictment," and must set out the facts, constituting the offence, with such certainty that the accused may be enabled to judge whether they constitute an indictable offence or not, and that he may be enabled to determine the species of offence with which he is charged. *State* v. *Bryson*, 84 N. C., 780; *State* v. *Hawes*, 65 N. C., 301.

We are of opinion that the warrant in this case is not illegal, and was a sufficient justification to the deceased, and the slaying him while acting in obedience to its commands, under the circumstances of this case, constitutes the crime of murder.

The seventh, ninth, fifteenth and seventeenth instructions asked are not supported by any evidence in the case; the tenth is not sustained by any authority; the eleventh, twelfth, thirteenth and fourteenth are met by the proofs that the warrant was read to the prisoner by the deceased at the time of the arrest, and he was told that the arrest was made by the authority of that warrant.

There were some exceptions taken to the evidence on the trial, but deeming them untenable, it is needless to consider them.

There is no error. Let this be certified, &c.

No error. Affirmed.

STATE v. HENRY ROUSE.

Practice.

Where no error appears, the judgment below will be affirmed.

PEACE WARRANT tried at Fall Term, 1881, of JONES Superior Court, before *Shipp, J.*

The judgment was that the defendant pay the costs of the prosecution, and he appealed. The defendant was not represented by counsel in this court. The Attorney-General submitted the case upon the record.

ASHE, J. The only record sent to this court is a peace warrant issued by a justice of the peace against the defendant, and an itemized bill of costs to the amount of one dollar and a half, with the following entry, "Paid by Henry Rouse, one dollar."

"And afterwards, to-wit, at the term of said court, begun and held for the county aforesaid, cometh the said Henry Rouse in his own proper person, and having heard the said warrant read, he joins issue with the state on the matters and things therein charged and specified against him; and the matter being fully heard and tried before the court, it is considered by the court that the defendant pay the costs of the prosecution. From the said judgment, the said Henry Rouse prays an appeal to the supreme court, and it is allowed on his giving bond with Jacob F. Scott as surety." And then follows the appeal bond and the certificate of the clerk, "that the foregoing is a true, full and perfect transcript of the record of said court." This is one of the fruits of cheap litigation.

There is no error. The judgment is affirmed.

No error. Affirmed.

STATE v. HARRISON JONES.

Recognizance—Judgment nisi and absolute—Scire Facias, a notice.

1. A bond taken by the sheriff in a sum fixed by the court and made payable to the state, with condition to be void if the defendant make his personal appearance, &c., is valid as a recognizance.
2. Where the defendant in such case failed to appear and judgment *nisi* was entered, and the sureties to the bond appeared in answer to a notice by *sci. fa.* and defended the action; *Held*, that the judgment absolute rendered against them is not irregular.

(*Jones* v. *Penland*, 2 Dev. & Bat., 358; *Hyatt* v. *Tomlin*, 2 Ired., 149; *Duffy* v. *Averitt*, 5 Ired., 455; *Middleton* v. *Duffy*, 73 N. C., 72; *Wheeler* v. *Cobb*, 75 N. C., 21; *State* v. *Houston*, 74 N. C., 549, cited and approved).

MOTION by defendant sureties to set aside a judgment, heard at Fall Term, 1882, of DUPLIN Superior Court, before *MacRae, J.*

The defendant having been tried and convicted upon one criminal charge, and there being another depending against him, at fall term, 1880, of Duplin superior court, was, by its order, committed to the custody of the sheriff, and he was directed, on the defendant's giving two bonds, one in the penal sum of $500 for his appearance at the next term in the case where he was found guilty, and the other in a smaller sum for his appearance in the other case, to discharge him from custody.

The bonds of these amounts were executed by the defendant and four others, his sureties, payable to the state, and with condition to be void if the defendant, Harrison Jones, "shall make his personal appearance at the spring term, 1881, of said court, and not depart the same without leave of the court." The bond was justified before a justice of the peace who also became a subscribing witness, and on its delivery to the sheriff the defendant was released from imprisonment.

At spring term, 1881, the defendant was called, and failing

to appear, judgment *nisi* was entered up against him and all his said sureties on the $500 obligation, and a *scire facias* ordered to issue against them.

At the next term the surety obligors appeared by counsel and entered a suggestion of the death of the principal. To enable them to produce evidence of the death, the cause was continued; and at spring term, 1882, the cause coming on to be heard and the sureties failing to produce any evidence of the death, judgment final was entered against them for the penalty of the bond.

At fall term, 1882, after notice given to the solicitor of the intended application, the sureties moved the court to set aside the judgment, assigning as reasons therefor, that:

1. There was irregularity in issuing the writ of *scire facias* instead of a summons.

2. The bond being taken to the state and not to the sheriff, is illegal and void under section 17 of chapter 107 of Battle's Revisal.

3. The bond is only good at common law, and neither in form nor effect a recognizance.

The judge held that the instrument was in legal contemplation and effect a recognizance; the *scire facias* was notice to show cause; and the appearance and failure to show cause was a waiver of the alleged irregularity. The motion was denied, and the sureties appeal.

Attorney-General and *O. H. Allen*, for the State.

Messrs. W. R. Allen and *H. R. Kornegay*, for the defendant sureties.

SMITH, C. J., after stating the above. The argument before us was such as might have been properly made if an appeal had been taken on the rendition of judgment, and the question was whether any or what judgment ought to be given. The cases cited bear upon this aspect of the case. But this is not its condition on the present appeal. The surety obligors have had

their day in court, have appeared and defended the action, and have submitted to the judgment without assigning error and seeking its correction at the hands of a reviewing court. If erroneous, it ought not to have been rendered; but if rendered, it cannot be disturbed after the expiration of the term. All defences existing at the time and available ought to have been then set up, and if they were not, they are alike concluded by the result. It is one thing to refuse to give judgment, quite another to set it aside, when entered, at a subsequent term.

Nor is there such irregularity as calls for the corrective interposition of the court. The object of process is to give notice and an opportunity to make defence to an action. The *scire facias* furnished this notice, and the sureties submitted to the jurisdiction and resisted the demand for judgment. A defendant may appear without process, and his appearance dispenses with process, since its purpose is to bring him into court, and he is in court when he answers and defends the action. It can scarcely be necessary to cite authorities to this effect, and we will refer only to some in our own reports—*Jones* v. *Penland*, 2 Dev. & Bat., 358; *Hyatt* v. *Tomlin*, 2 Ired., 149; *Duffy* v. *Averitt*, 5 Ired., 455; *Middleton* v. *Duffy*, 73 N. C., 72; *Wheeler* v. *Cobb*, 75 N. C., 21.

But we do not concede that the defence would have been sufficient if made at the time of rendering the judgment. Aside from the fact that the obligation was attested by and justified before a justice of the peace before acceptance by the sheriff, we have in *State* v. *Houston*, 74 N. C., 549, an express adjudication that it was competent for the judge to authorize the sheriff "to take the recognizance of the defendants for the appearance of the principal defendant at the next term, to answer the charge of the state against him," the judge having fixed its amount; and that though the instrument was put "in the form of a bond with conditions, signed and sealed by the defendants, yet it is valid as

a recognizance." While there are opinions elsewhere expressed, not perhaps in harmony, we are disposed to accept this as a correct statement of the law.

But however this may be, the exception could only be entertained on the trial and before the rendering of judgment. It was too late to be taken on the motion to vacate the judgment. If the refusal to set aside the judgment be a reviewable ruling and not the exercise of discretion, which we do not, as unnecessary, undertake to decide, we concur in the action of the court, and the judgment must be affirmed.

No error. Affirmed.

STATE v. DANIEL N. McIVER.

Roads—Indictment for obstructing—Appropriation of private property to public use.

1. The defendant was convicted for obstructing a public highway, where it appeared that the same was established by a regular proceeding instituted for that purpose; the defendant was appointed and acted as overseer for one year, but failed to open the road; his successor did open it, and in so doing removed the fences which crossed it on the defendant's premises; the defendant replaced these fences, thereby obstructing the road; *Held*, that the conviction was proper.

2. The rule in this state in reference to the appropriation of private property to public use, is, not that the compensation to the owner shall precede the act of appropriation, but that provision shall be made by which he shall certainly and ultimately be paid.

(*State* v. *Watts*, 10 Ired., 369; *State* v. *Lowry*, 74 N. C., 121; *R. R. Co.* v. *Davis*, 2 Dev. & Bat. 451, cited and approved).

INDICTMENT for obstructing a highway tried at Fall Term, 1882, of MOORE Superior Court, before *Gilmer, J.*

The defendant is indicted for obstructing a public highway, in the county of Moore, leading from Sanford to the Cool Springs. On the trial the jury returned a special verdict as follows, and asked the instruction of the court thereon:

In 1879, a petition for the establishment of said road as a public highway was filed before the board of commissioners for the county, and at their March meeting in that year, seven freeholders were appointed to view and lay off the same. Five of the freeholders met on the 12th day of April, 1879, and proceeded to examine the route and mark out the road, and made report thereof to the May meeting of the board, when the same was approved.

In August of the same year, the board of commissioners appointed one D. B. McIver to build a cattle-guard near the defendant's premises (and across the track of the Cape Fear & Yadkin Valley railroad), at a cost not to exceed the sum of thirty-five dollars, which cattle-guard has never been built by any one.

In January, 1881, the freeholders originally appointed to lay off the road, met upon the land of the defendant and proceeded to assess his damages by reason of the establishment of said highway, and fixed the same at the sum of twelve dollars. The defendant was present at this assessment, and agreed to the amount, but insisted that the county should build the cattle-guard as proposed, and thereupon he was informed by some one of the freeholders that the county had provided for the same, and that he was not expected to pay for it out of the sum assessed to him as his damages. This action of the freeholders was afterwards approved by the board of commissioners, and the sum assessed allowed by them, though it did not appear that the same had ever been paid.

The defendant was thereupon appointed overseer of said road and acted as such for one year, but failed to remove the fences upon his own land which crossed the same. During the year he made frequent appeals to the board to have the proposed cattle-

guard erected; and, failing in this, asked leave to so change the road as to lead to an old cattle-guard also upon his premises, when he was informed of the provision of the law for changing a highway when altogether upon one's own land. He thereupon undertook to effect the change in that way, and had a justice and two freeholders to examine the new route and report the same to the commissioners of the county, who refused, however, to give it their approval.

Another overseer for the road was then appointed, who removed the defendant's fences from across it, when the same were replaced by him and maintained until the finding of the indictment.

Upon these facts thus established by the verdict, the court was of opinion against the defendant, and gave judgment against him, and he appealed.

Attorney-General, for the State.
Mr. W. E. Murchison, for defendant.

RUFFIN, J. The verdict, as rendered by the jury, is so indistinct as to many particulars, and so full of superfluous matter, that our first impression was that we should be compelled to set it aside and award a *venire de novo* to the defendant, such being the rule of this court whenever a special verdict is so defective that no judgment can be pronounced upon it. *State* v. *Watts*, 10 Ired., 369; *State* v. *Lowry*, 74 N. C., 121.

But upon a more thorough examination, those facts, which we deem material to the issue between the state and the defendant, appear to be established with sufficient certainty to justify the court in acting upon them, and hence we have concluded to consider the cause upon its merits.

The material facts, as we conceive them to be, and which plainly appear upon the face of the verdict, are as follows: Upon a petition regularly filed before them, the commissioners of the county directed the road in question to be established as

a public highway, and appointed the requisite number of freeholders to lay out and mark its route. The designated freeholders, after performing this duty, made report thereof to the commissioners, who approved and confirmed the same. Afterwards, the same freeholders proceeded to assess the defendant's damages by reason of the road, and fixed the same at twelve dollars, which action on their part was likewise reported to and approved by the commissioners. The defendant was appointed, and acted as overseer of the road for one year, but failed to open the same. Another overseer was appointed, who did open it, and in so doing removed the fences which crossed it upon the premises of the defendant. These fences the defendant afterwards replaced, thereby obstructing the road, and continued to maintain them, though forbidden to do so.

Whatever else is stated as touching the promise and failure on the part of the commissioners to construct the cattle-guard, and the attempt of the defendant to change the route of the road upon his own lands, seems to us to be surplusage, and wholly beside the issue.

Taking the facts enumerated as those which constitute the case, they come fully up to the requirements of the statute prescribing the manner of laying out public roads, and clearly and unequivocally show the road in question to have been established, as a highway, and leave no room to doubt the guilt of the defendant.

It was indeed contended at the bar, that inasmuch as it did not appear that the damages assessed had actually been paid to the defendant, it was not within the constitutional power of the county authorities to take his private property and devote it to the uses of the public. The argument is, that it is essential to the exercise of every right of eminent domain on the part of the sovereign, not only that just compensation should be provided for the owner of property taken, but that its actual payment must precede the act of taking, or else the latter is in itself illegal

and void. Such does not seem to be the result of the decisions in the courts of many of the states of the Union, growing, however, in most of the cases, out of the express provisions of their respective constitutions. But no such provision is to be found in the fundamental law of this state, and ever since the early case of *R. R. Co.* v. *Davis*, 2 Dev. & Bat., 451, it has been uniformly held, with us, not to be essential to the lawful appropriation of private property to public necessities, that compensation to the owner should precede the act of appropriation; but that it was sufficient if provision be made whereby the owner should be certainly and ultimately compensated, and an impartial tribunal be instituted for assessing the rate thereof, and a mode provided for enforcing its payment, if the same should be delayed.

Our general statute upon the subject of "Roads" fully answers to all these requirements of the law. It provides that the same jury, who shall lay off any highway, shall assess the damages done to all private persons, and that, when assessed, they shall become a *county charge* (Bat. Rev., ch. 104, § 4); and the jury find, as we have seen, that all its terms were faithfully complied with in this particular instance. The amount of damages done by the road to the land of the defendant was assessed by a jury, to whom he made no objection at the time, and being made by the law a charge upon the county, its payment, if not already made, may be enforced by a *mandamus*, as in the case of any other debt owing by the county.

Our conclusion, therefore, is, that the defendant is guilty upon the facts as set forth in the special verdict, and the judgment of the superior court is affirmed.

At the same time, we do not hesitate to say, that his case strikes us as a hard one. It is plain that the jury were misled by the order of the board, with reference to the cattle-guard, into fixing his damages at so small a sum, and while their mistake cannot be remedied by the courts, it is well for the commissioners to consider how a failure, under such circumstances, to carry out their order,

is consistent with fair dealing, or with that example of good faith which all persons in authority should set before the public.

There is no error. Let this be certified.

No error. Affirmed.

STATE v. H. S. WHITLEY.

Tales-jurors, qualification of.

A tales-juror is required to possess the same qualifications as one of the regular panel, with the additional one of being a freeholder.

(*Lee* v. *Lee*, 71 N. C., 139, cited and approved).

INDICTMENT for perjury, removed from Wilson, and tried at Fall Term, 1881, of EDGECOMBE Superior Court, before *Gilmer*, *J.*

Verdict of guilty; judgment; appeal by defendant.

Attorney-General, for the State.

Messrs. Reade, Busbee & Busbee, for defendant.

RUFFIN, J. Without going beyond the first exception, the court thinks the defendant clearly entitled to have his cause tried by another jury.

A tales-juror was called and challenged upon the ground that he had not paid his tax for the preceding year. The non-payment was admitted, but the court held it not to be a good cause of challenge, and the defendant excepted.

It is needless to argue the point, as it was distinctly presented and determined in *Lee* v. *Lee*, 71 N. C., 139, where it was held, that, upon a proper construction of the statutes upon the subject (Bat. Rev., ch. 17, § 229 a, and page 860—*Addenda to Code*)

a tales-juror is required to possess the same qualifications as one of the regular panel, with the additional one of being a freeholder; and in Thompon on Juries, § 100, it is said that talesmen must possess the statutory qualification of regular jurors.

But, in the absence of any authority, it would seem impossible, upon reflection, to avoid coming to the same conclusion, since, in prescribing a new and specific qualification for tales-jurors, it cannot be supposed that the legislature intended to dispense with the old safe-guards. As suggested by counsel, the very term, "tales-jurors," imports that they must be *such* as are qualified.

We have not considered the other exceptions, as they relate to matters that are not likely to occur upon another trial, except the one in reference to the variance between the proofs and the full matter alleged in the indictment—and this, without undertaking to decide it, we venture to say, it would be safest to remove by sending another bill.

For the error in disallowing the challenge to the juror, there must be another trial.

Error. *Venire de novo.*

STATE v. O. S. LANGSTON.

Towns and Cities—Jurisdiction.

The power conferred by a town charter to pass ordinances for its local government, is in subordination to the public laws regulating the same matter for the entire state; *Therefore*, a town ordinance punishing the offence of selling liquor on Sunday, must give way to the general statute on that subject. Act 1877, ch. 38. The jurisdiction to try such offence is given to the superior court.

(*Washington* v. *Hammond*, 76 N. C., 33, cited and approved).

STATE *v.* LANGSTON.

CRIMINAL ACTION commenced before the mayor of a city, and heard on appeal at Fall Term, 1882, of WAYNE Superior Court, before *MacRae, J.*

Attorney-General, for the State.
Mr. W. T. Dortch, for defendant.

SMITH, C. J. The defendant was brought before the mayor of the city of Goldsboro, on his warrant, charged with violating an ordinance of the city which forbids any person, having license, to sell spirituous liquors on the Sabbath, and imposes a fine of twenty dollars therefor. He was convicted on the trial, and appealed to the superior court, where the action was dismissed for want of jurisdiction in the mayor, and thence the appeal by the solicitor for the state brings the cause to this court.

The general assembly, at its session of 1876–'77, passed an act which went into effect on January 11, 1877, the first section whereof declares it "unlawful for any person to sell spirituous or malt, or other intoxicating liquors on Sunday, except on the prescription of a physician and for medical purposes." The second section enacts that "any person so offending shall be deemed guilty of a misdemeanor, and on conviction shall be fined or imprisoned, or both, at the discretion of the court." The third section repeals all acts inconsistent with it. Acts 1876–'77, ch. 38.

This statute, more comprehensive in its scope than the ordinance, embracing as well those who have not, as those who have, license to sell, and involving the same criminal act for which is prescribed a punishment by fine or imprisonment at the discretion of the court, must supersede the latter.

The rule is thus stated as a deduction from the decided cases: "A general grant of power, such as a mere authority to make by-laws, or to make by-laws for the good government of the place, and the like, should not be held to confer authority upon the corporation to make an ordinance punishing an act; for

example, an assault and battery, which is made punishable as a criminal offence by the laws of the state." 1 Dill. on Mun. Corp., § 302. The power conferred upon the municipal body is presumed to be in subordination to a public law regulating the same matter for the entire state, unless a clear intent to the contrary is manifest.

The ruling of the court is fully sustained by the decision in *Town of Washington* v. *Hammond*, 76 N. C., 33, and must be affirmed.

No error. Affirmed.

STATE v. WINDAL TAYLOR.

Witnesses, examination of.

A party cannot contradict his own witness; where the state called and examined a witness, who was afterwards put upon the stand and examined by the defendant, *it was held* inadmissible for the state on cross-examination to discredit him.

(*State* v. *Norris*, 1 Hay., 495, overruled, and *Sawrey* v. *Murrell*, 2 Hay., 597, approved).

INDICTMENT for larceny tried at Spring Term, 1882, of LENOIR Superior Court, before *Gilmer, J.*

The defendant was charged with stealing a horse, the property of one Barfield.

The evidence on the part of the state tended to show that a cart and horse, the property of the prosecutor, were stolen on the night of the 14th of December, 1880, and the cart (one wheel of which made a peculiar track) was tracked from Lenoir county, some twenty-five miles, to Wilcox's Mill, in the county of Jones. The tracks were last seen near a bridge at that place. One of the

witnesses for the state testified that on the next night, by the light of the moon, which was shining very brightly, he saw the defendant riding the horse of the prosecutor near the bridge. He was riding in a walk when he first saw him, but from the appearance of the horse's tracks he seemed to have been put in a rapid run near the bridge. Both the defendant and the horse were well known to the witness.

With the view of corroborating this witness, the state introduced one Robert Harper, and offered to show by him that on the night of the 14th of December, on which the horse was stolen, he and one Sparrow were on their way to Goldsboro, and that between eleven and one o'clock he met three persons and a horse and cart; that one was on the horse's back and the other two were in the cart, riding on sacks filled with something; that he did not know any of the three, but after they passed a minute or two he took one of the parties to be the defendant; that he knew the defendant was in the habit of wearing a broad-brim hat; that he thought of the hat the defendant was in the habit of wearing after they had passed him, and that was the only thing which caused him to think of the defendant, and that he did not notice the shape of the man.

The state also offered testimony to show that the prosecutor's cart was found in the woods about three hundred yards from the point in the road where the tracks were lost, and when found had been taken to pieces—the body in one place, the wheels in another, and the axletree hidden under a tree in another place; and near the same place were found papers torn and thrown on the ground that appeared to be wrappers of packages of soda and starch.

The state then offered to show by one Quin, that, on the same night the horse was stolen, he lost, by theft, from his store, which was in the same neighborhood in which the prosecutor resided and had been broken into, soda and starch, which were wrapped in paper corresponding with the description of the packages found near the missing cart.

The defendant, in his behalf, introduced the said Harper, who had been examined by the state, who testified to a conversation which he stated he had with said Quin about the identification of the horse, which Quin had testified had not occurred. The state, on the cross-examination of this witness, exhibited to him his written examination taken by the justice of the peace, and proposed to ask the witness if he did not swear therein that he took one of the persons he met in the cart, as aforesaid, to be the defendant *by his shape and his looks*. This was objected to, but allowed. The witness swore that he made no such statement, and the state in reply offered to show by the justice of the peace that the witness, Harper, signed the said statement as produced, and that the same was read over to him, and that said Harper, on such examination before him, did swear that he took the person in the cart to be the defendant *by his shape and his looks*, as recorded in said statement, and those were his very words. The defendant objected to this evidence. It was admitted by the court, and the defendant excepted. There was a verdict of guilty, and judgment against the defendant, from which he appealed.

Attorney-General, for the State.
Messrs. Strong & Smedes, for defendant.

ASHE, J. Several exceptions were taken to evidence by the defendant, in the course of the trial, but we deem it unnecessary to consider any of them, except that taken to the evidence of the justice, which was offered, as we understand, to discredit the testimony of the witness Harper.

From the statement of the case, it seems the witness Quin, in his examination, had been asked if he had not had a certain conversation with the witness Robert Harper, in regard to the identification of the stolen horse, and he denied that such a conversation had occurred. Harper was then recalled by the defendant, and testified that such a conversation did occur. The state then, on cross-examination, asked Harper if he had not sworn

on the examination before the justice, that he took one of the persons in the cart to be the defendant *by his shape and his looks.* This the witness denied, and the court allowed the state to produce evidence to contradict him, and show that he had made that statement upon oath.

We can see no ground for the admission of this evidence, except for the purpose of discrediting the witness Harper. He had been introduced and examined by the state, as its witness, and the question is presented, can the state thus discredit its own witness?

The principal case relied on by the state for such a practice is that of the *State* v. *Norris*, 1 Hay., 495, where it was held that it might be done, but in the note to that case Judge Battle says it is not law, and cites the case of *Sawrey* v. *Murrell*, 2 Hay., 597, where the contrary doctrine is announced, and the decision in that case, we think, is supported by the authorities.

Mr. GREENLEAF (Vol. 1, § 442) says, "when a party offers a witness in proof of his cause, he thereby in general represents him as worthy of belief. He is presumed to know the character of the witnesses he adduces, and having thus presented them to the court, the law will not permit the party afterwards to impeach their general reputation for truth, or to impugn their credibility by general evidence tending to show them unworthy of belief"; and in same volumne, section 444, Mr. REDFIELD, the editor, says: "The question is extensively discussed in the case of *Melhirst* v. *Collier*, 15, Q. B., 878, both by counsel and by different members of the court, and the conclusion arrived at is, that you may cross-examine your own witness if he testify contrary to what you have a right to expect, as to what he had stated in regard to the matter on former occasions, either in court or otherwise, and thus refresh the memory of the witness and give him full opportunity to set the matter right, if he will, and at all events to set yourself right before the jury. But you cannot do this for the mere purpose of discrediting the witness; nor can you be allowed to prove the contradictory statements of

the witness on other occasions, but must be restricted to proving the facts by other evidence. The same rule prevails in the courts of admiralty, and this seems to us to be placing the matter upon its true basis."

In England, it required a statute (17 and 18 Victoria, ch. 125) to allow a party to an action to contradict his own witness, by showing a statement made by him in direct contradiction to his evidence.

In Massachusetts, it has been held that a witness, who has testified in chief that he did not know a certain fact, cannot be asked by the party calling him, whether he had not on a former occasion sworn to his knowledge of the fact, as the object of the question could only be to "*disparage the witness*" and show him unworthy of credit with the jury, which was inadmissible. *Commonwealth* v. *Welch*, 4 Gray, 535.

Concluding, as we have, that the testimony of the justice was offered in this case for the sole purpose of discrediting the witness, Harper, we are of the opinion, induced by the authorities cited, that the exception of the defendant was well taken.

There is error. This will be certified to the superior court of Lenoir, that a *venire de novo* may be awarded.

Error. *Venire de novo.*

STATE v. D. H. WHITE.

Witness before Grand Jury—By whom sworn—Inspection of Enrolled Act.

1. The act of 1879, ch. 12, authorizing the foreman of the grand jury to swear witnesses to be examined before it, does not withdraw the authority from the clerk of the court. *State* v. *Allen*, 83 N. C., 680.

STATE *v.* WHITE.

2. In passing upon the matter of exception, the court by inspection of the enrolled act, in the office of the secretary of state, found that the word "duly," in the printed act, should be read "only."

INDICTMENT for forgery tried at January Term, 1883, of WAKE Superior Court, before *McKoy, J.*

On the arraignment of the defendant, his counsel moved to quash the indictment on the ground that the witnesses, upon whose testimony before the grand jury the bill was found, were sworn before the clerk and not by their foreman, who alone, it was insisted, is authorized under chapter 12 of the acts of 1879, to administer the oath. The motion was refused; the defendant entered a plea of not guilty, was tried and convicted, and appealed from the judgment pronounced.

Attorney-General, for the State.

No counsel for defendant.

SMITH, C. J. The only question presented in the record for decision, is the correctness of the ruling upon the preliminary motion to quash.

It appears from an inspection of the enrolled act, in the office of the secretary of state, that it differs from that contained in the printed acts of 1879, in that, the former uses the word "only," for which the latter substitutes the word "duly." The act is entitled "An act to empower the foreman of grand juries to administer oaths," and section one, corrected, enacts:

"That the foreman of every grand jury only sworn and impaneled in any of the courts of this state, shall have power to administer oaths and affirmations to persons to be examined before it as witnesses," with provisoes not pertinent to the present inquiry.

It is contended that the force and operation of the act are to exclude every other person from the administration of an oath to a witness to be examined before a grand jury, and confine the exercise of the power to its foreman; and that this construction

is rendered necessary by the use of the word "only," in expressing its meaning. We do not concur in this view.

The title to the act indicates its sole purpose to be, to confer an authority upon the foreman (which he did not before possess) to swear the witnesses, not to withdraw it from any in whom it is vested under existing laws. The sanction of the statute does not, in terms, go beyond the purpose expressed. It simply confers the power upon the *foreman alone and no others*, a restriction which would exist if the word was not found in the sentence, and which is not enlarged by its presence. The language will admit of an interpretation that excludes all other persons or all other members of the grand jury from participating with the foreman in exercising the authority conferred—a needless limitation, yet one that does not take it away from those who already have it. The entire scope of the enactment is to make the foreman to do a certain act, not to disable any one from doing what, by existing law, he could do; and this is its full extent and force.

It would seem probable that an error was committed in transcribing the act into the enrollment, or at some previous period of its progress, which escaped notice and prevented a correction; but however this may be, the word upon which such stress is laid, does not, in our opinion, change the import of the statute, or defeat the manifest intention of the general assembly in making it.

It must be declared that there is no error, and this will be certified to the end that the court proceed to judgment.

No error. Affirmed.

STATE v. MORGAN, from Wake:

The solicitor has the right, by leave of court, to enter a *nol. pros.*, after a general verdict of guilty, to one of the counts in an indictment for larceny and receiving, &c. *State* v. *Jones*, 82 N. C., cited and approved.

BELL v. R. R. CO., from Halifax:

The counsel for appellant abandoned the exceptions, conceding that they could not be sustained. Judgment of the court below affirmed.

STATE v. BAILEY, from Mitchell:

Proceeding in bastardy. The questions raised on the trial are governed by the decision in *State* v. *Rogers*, 79 N. C., 609, and *State* v. *Crouse*, 86 N. C., 617. Judgment of the court below affirmed.

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ACCOUNT:

Proof of, when goods sold on written orders, 145.

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ACT OF ASSEMBLY, inspection of enrollment, 698 (2).

ACTION:

An action, not transferred to the new docket under sections 400 and 401 of the Code, is still a subsisting one until disposed of by a judgment. *Murrill* v. *Humphrey*, 138.

ACTION TO RECOVER LAND:

1. A certified copy of a deed is evidence of its probate and registration; and a probate as follows: "Sampson county, August term, 1812: Then was the above deed acknowledged in open court, H. Holmes, C. C.," shows the official character of the clerk. *Strickland* v. *Draughan*, 315.
2. Parol evidence is admissible to show the position of boundary marks mentioned in a deed. *Ib.*
3. Where a deed calls for a natural object and the line gives out before reaching it, the line must be extended to the natural object and the distance disregarded. *Ib.*
4. A copy of an abstract of a grant, dated in 1799, bearing the signature of the governor of the state and certified to by the register, is admissible in evidence to show that the land has been granted. *Ib.*
5. A mistake, as to course and distance in the calls of a deed, may be corrected where the means of correcting the same are furnished by more certain descriptions contained in the deed; and where there is a discrepancy between course and distance and the other descriptions, the former must give way. *Credle* v. *Hays*, 321.
6. A deed is color of title only for the land designated and described in it. *Davidson* v. *Arledge*, 326.
7. A dispute as to the true location of a line separating two town lots must be determined by an interpretation of the descriptive words contained in the deeds. *Ib.*
8. If the words simply designate the lots by number, the boundary, as circumscribed by actual use and occupation, is the one meant by the

bargainor. But where they refer to the lots not only by number, but "as known and designated in the plan" of the town, which plan contains a specific description thereof, it is the same as if that description were incorporated in the deed, and the latter must prevail; and it is incompetent to show by parol that the boundaries were intended to be different. *Ib.*

9. Whether a dividing line between contiguous tracts can be changed by recognition and acts of ownership of the proprietors (?). *Ib.*

10. The bargainee in an unregistered deed has a legal title, which, though incomplete, cannot be defeated by the mere act of the bargainor in executing another deed to a third party, without notice, and whose deed is registered. *Phifer* v. *Barnhart*, 333.

11. Although such deed cannot be given in evidence until registered, and does not, therefore, convey a perfect legal title, yet, when registered, it relates to the time of its execution, and the title becomes complete. *Ib.*

12. A sheriff's deed, made in pursuance of an execution sale, operates from the day of the sale, not from the date of the deed. *Cowles* v. *Coffey*, 340.

13. In such case, the purchaser, being clothed with the legal title from the day of sale, is also subjected to the consequences attending a possession, under color, held adversely to him. *Ib.*

14. Parol evidence is admissible to fit the description contained in a deed to the land, where the ambiguity is latent; otherwise, where it is patent. *Wharton* v. *Eborn*, 344.

15. A deed (or bond for title as here) as follows: "For fifty acres of land situate and lying on the head-waters of Elk Shoal creek as far as the waters of Radford creek, to interfere with no land before sold"; *Held*, that the description is not sufficient to admit parol evidence to identify the land. *Radford* v. *Edwards*, 347.

16. The rule that requires the annexing of the word "heirs" to the name of the grantee in order to pass a fee, is firmly established and must be enforced. Here, there are no conveying words to which the word "heirs," contained in the warranty clause, can be transferred. *Batchelor* v. *Whitaker*, 350.

17. Where a firm, or tenants in common, acquire an estate for the life of the bargainor, one member of the firm or one of the tenants in common may purchase the reversion in fee and hold the same to his sole and separate use, where the facts, as in this case, do not establish an equity in favor of the others. *Ib.*

18. The law in force, at the time of the death of the ancestor, was, that an

undevised estate held by a decedent for the life of another, should be personal assets in the hands of the personal representative. Rev. Stat., ch. 46, § 22. *Ib.*

19. Where a natural object (for instance a stump) is called for as the beginning corner of a tract of land, and the reputation for thirty years has pointed to that object as the corner, it is error to hold that this constitutes *no evidence* of the fact that a line beginning at that point, and corresponding with the first call of the grant, was actually run and marked. *Murray* v. *Spencer*, 357.

20. Where the description in the grant calls for a marked tree and also the line of another tract, which are inconsistent, the issue is one of fact and not of law. Which description will control (?). *Ib.*

21. Evidence of the mental condition of a deceased mortgagor, directly bearing on the inquiry whether he in his life-time consented to a sale of the land by the mortgagee, cannot be excluded upon the ground that it tends to impeach the validity of the deed. *Bruner* v. *Threadgill*, 361.

22. Evidence of the estimated value of a lot on the opposite side of a street from that in dispute, is incompetent to show the value of the latter; it would introduce a new issue (the value of another lot) open to proof like the issue already before the jury. *Ib.*

23. Every possession of land by one other than the claimant is deemed to be adverse until proof to the contrary is made. *Ruffin* v. *Overby*, 369.

24. Where acts of ownership consisted in the payment of taxes on the land, and the employment of agents in respect to it, in the absence of *actual* possession on the part of the alleged owner; *Held*, error to permit the jury to consider such acts in passing upon the question of continuous possession required to perfect a colorable title under a deed. Here, the jury should have been instructed that no such continuous possession was shown by the plaintiff. *Ib.*

25. That the plaintiff in ejectment may recover upon an equitable title, is a settled rule of law in this state. *Condry* v. *Cheshire*, 375.

26. Where the defendant in such case claims the value of permanent improvements as against the rents, he may, after judgment and before execution, proceed by petition to have the same assessed. Bat. Rev., ch. 17, § 262*a*. The defendant, here, is not entitled to the right of substitution. *Ib.*

27. In ejectment, the plaintiff claimed as purchaser under a mortgage executed in 1869; the defendant, as purchaser under a mortgage executed in 1876, and failing to make good his title thereunder, he offered to show a sale of the land for taxes and a deed to himself from the sheriff, but this evidence was ruled out upon the ground

that the defendant is precluded, by the terms of his answer, from setting up any other title than that asserted therein; *Held*, error. *Keathley* v. *Branch*, 379.

28. As the plaintiff recovers upon the strength of his own title and the defendant is permitted to show that the title is in a stranger, so also, he may show it to be in himself, though derived from a source differing from the one alleged in the answer. *Ib.*

29. The court intimate that the Code cures the alleged variance between the pleading and the proof. *Ib.*

30. A deed to the plaintiff (a minor) was delivered to his father to keep for him, and a few days thereafter, in pursuance of a certain arrangement intended to give ease and favor to the father, the deed was destroyed without having been registered, and the land conveyed by the same grantor to the defendant; *Held*, in an action for the land, &c. (1) The plaintiff, being an infant, was incapable of parting with the estate conveyed, or of assenting to the destruction of the deed. (2) Equity will restore the plaintiff to the position he was in before the destruction of his muniment of title. (3) Payment of the land by relatives of the plaintiff, is a sufficient consideration to support the conveyance. (4) To entitle the defendant to priority over the plaintiff, he must show that he is not only a purchaser for value, but also without notice of the plaintiff's equity. *Brendle* v. *Herron*, 383.

31. The rule laid down in *Edwards* v. *Thompson*, 71 N. C., 177, and other cases, to the effect that actual possession of land by a person other than the bargainor, is sufficient notice to a purchaser of such person's equity, approved. *Johnson* v. *Hauser*, 388.

32. The declarations of a grantor, made at any time before a sale of land, are admissible against the grantee and those claiming under him; but otherwise, when they are made after the declarant has parted with the title and possession. *Headen* v. *Womack*, 468.

See Tax Title, 251 (2).

ADDITIONAL SECURITY:

Of principal does not discharge surety, 214 (2).
For costs, 116 (1).

ADMISSIONS, 208.

ADVERSE POSSESSION, 369.

AFFRAY:

An affray is cognizable in the superior court, as to both defendants, where it appears that a deadly weapon was used by either. *State* v. *Coppersmith*, 614.

AGENCY:

1. One who deals with an agent must ascertain the extent of his authority to contract for the principal. *Biggs* v. *Ins. Co.*, 141.
2. Ratification of the act of an unauthorized agent must, in order to bind the principal, be made after a full disclosure of all the facts and circumstances attending the transaction. *Johnson* v. *Royster*, 194.
3. The declarations of an agent in reference to acts not within the scope of his agency, are not admissible to affect the principal; *Therefore*, in an action against a railroad company for the penalty for delay in shipment of local freight, it was held error to admit the declarations of a station agent, to the effect that the company, during a certain season, used most of its cars in transporting through freighth, is agency being unconnected with the through freight business. *Branch* v. *Railroad*, 573.

AGRICULTURAL PARTNERSHIP:

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AMBIGUITY, LATENT AND PATENT, 344.

AMENDMENT OF PLEADING, 58, 95 (3—6).

AMERCEMENT OF CLERK:

A clerk is liable to the penalty of $100 for failure to issue execution on a judgment (rendered upon a debt contracted since May, 1865) within six weeks of its rendition. The convention ordinance of 1866 does not repeal the act of 1850, which provides the remedies for the recovery of such debts, Bat. Rev., ch. 44, § 28. Whether it is repealed as to debts contracted prior to May, 1865—*Quære*. *Williamson* v. *Kerr*, 10.

APPEAL:

1. Appeals brought up in a fragmentary manner will not be entertained. *Commissioners* v. *Satchwell*, 1.

2. An undertaking that the appellant shall pay all costs that may be awarded against him on an appeal from a justice's court, and that if the judgment or any part thereof be affirmed, or the appeal dismissed, the appellant shall pay the amount directed to be paid by the judgment, is in compliance with the statute, and does not restrict the obligation to pay the judgment (if affirmed) as rendered in the justice's court, but the signers are bound to pay such as may be rendered in the superior court against the appellant. It is not necessary, to bind the appellant party to the suit, that he should sign the undertaking. *Walker* v. *Williams*, 7.

3. Motion for writ of *recordari*, as a substitute for an appeal, must be made at the next ensuing term of the appellate court. *Boing* v. *R. R. Co.*, 62.

4. A *certiorari* will not be granted, first, where the agreement to waive the code-rule of making up case is oral and denied by either party; or secondly, where the terms thereof are to be decided by conflicting affidavits—except where the waiver can be shown by the affidavits of the appellee, rejecting those of the appellant. *Scrogg* v. *Alexander*, 64.

5. A *certiorari* will be granted, as a matter of right, where it appears that the appellant has been deprived of his appeal by no laches on his part, but by the conduct of the opposing party, as shown here. *Wiley* v. *Lineberry*, 68.

6. The court suggest that if any difficulty arises in procuring a statement of the case, parties should cause the record proper to be filed and the case docketed, so that they may be in a position to ask the aid of the court in perfecting the appeal without delay. *Ib.*

7. Appeals in criminal as well as in civil cases must be taken to the *next* ensuing term of this court. *State* v. *O'Kelly*, 609.

8. Where the judge who tries a criminal action goes out of office before making up the case on appeal, a new trial will be awarded, provided the defendant himself is guilty of no laches. *Ib.*

9. It is the duty of the judge who tries a criminal action to make up the case on appeal. *State* v. *Randall*, 611.

10. The rule laid down in the preceding case in reference to the duty of the appellant to be diligent in perfecting the appeal, approved. *Ib.*

APPEAL, from board of commissioners in revenue matters, 56 (2).

ARREST AND BAIL:

The provision of the constitution (Art. I, § 16) prohibiting "imprisonment for debt, except in cases of fraud," has no application to actions

for tort; it is confined to causes of action arising *ex contractu*. *Long* v. *McLean*, 3.

ARREST, jurisdiction in cases of, 19.

ASSAULT AND BATTERY:

1. The parties were disputing about a piece of land—the prosecutor on one side of a fence advanced towards the defendant with an axe—the defendant on the other side shot him across the fence; *Held*, the principle of self-defence has no application, but defendant is guilty of an assault. *State* v. *Leary*, 615.
2. Where the facts of a case of homicide constitute the crime of manslaughter, the same state of facts will make the case of an assault if no killing ensues. *Ib.*
3. A defendant, who has reason to believe, and does believe, at the time and under the circumstances, that he is in immediate danger, is justified in resisting his assailant, though the danger did not in fact exist; but the jury must determine the reasonableness of his belief; *Therefore*, it was error to exclude from the consideration of the jury the evidence upon which such belief is grounded. *State* v. *Nash*, 618.

ASSAULT WITH INTENT, &c., 654.

ASSETS, what are, 403, 440.

ATTACHMENT:

1. An attachment may be had in support of any demand arising *ex contractu*, the amount of which is ascertained or is susceptible of being ascertained by some certain standard referable to the contract itself, but otherwise, where the claim is for purely uncertain damages; *Therefore*, where the plaintiff sought to recover compensation for the loss of profits, alleged to have resulted from the failure of defendant to furnish certain goods which the plaintiff was to sell as his agent; *Held*, that an attachment would not lie. *Wilson* v. *Manufacturing Co.*, 5.
2. A motion to dissolve an order of attachment may be made before the return term of the summons in the action. *Ib.*

ATTORNEY AND CLIENT, neglect of, 62, 197 (2).

BANKRUPTCY:

1. A creditor proving his claim in bankruptcy does not waive his right of action in the state court against the bankrupt, where a discharge has

been refused or the proceedings determined without a discharge. This provision of the bankrupt act affects the remedy only, and applies to existing suits. *McFadgen* v. *Council*, 220.

2. No debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer (here, as sheriff) or while acting in a fiduciary capacity, shall be discharged by proceedings in bankruptcy. *Councill* v. *Horton*, 222.
3. The decision in *Blum* v. *Ellis*, 73 N. C., 293, approved in subsequent cases, to the effect that creditors of a bankrupt must enforce their liens in the bankrupt court, is the settled law of this state. *Windley* v. *Tankard*, 223.
4. The extent in value and duration of a homestead allotment, made in the bankrupt court, is the same as prescribed by the law of the state. *Ib.*
5. A homestead is allowed against a judgment obtained on a new promise to pay a debt after the discharge of the defendant in bankruptcy in 1870. *Fraley* v. *Kelly*, 227.
6. A promise of defendant to pay a debt discharged in bankruptcy, does not revive the original contract so as to re-invest it with an actionable quality, but only recognizes it as the consideration to support the new promise. *Ib.*

BASTARDY:

The questions raised on the trial of this case, are governed by the decision in *State* v. *Rogers*, 79 N. C., 609, and *State* v. *Crouse*, 86 N. C., 617; *State* v. *Bailey*, 701.

BETTERMENTS:

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COMMISSIONER, sale of land by, 391.

COMMISSIONS, allowed to fiduciary, 416 (4).

COMMON OF PASTURE, 564.

CONCEALED WEAPONS:

Neither a deputy marshal of the United States, nor any other civil officer, has the right to carry a weapon concealed about his person, while off his own premises, unless he is actually engaged in the discharge of his official duty; and the burden is upon him to show that fact. *State* v. *Hayne*, 625.

CONDONATION, in divorce suit, 45.

CONFEDERATE MONEY:

1. The rule announced in previous decisions of the court, as to the acceptance and management of confederate money by trustees during the late war, affirmed. *Green* v. *Rountree*, 164.
2. A bond executed in 1863, payable four years after date, which contains an express stipulation that payment in specie is not to be demanded, and the obligor at the time, instead of giving the bond, tendered a cash payment in confederate money, which was declined, is not solvable in confederate currency. But it was not error, in this case, to reduce it to the amount of another bond to which the scale of depre-

ciation was applied, the two bonds being made with reference to the same transaction, and with the understanding that what would pay one should be taken in payment of the other. *White* v. *Jones*, 166.

CONFEDERATE MONEY, management of by fiduciary, 407, 8.

CONSIDERATION:

Need not be stated in contract for land purchase, 293.

To support deed, 383.

CONSPIRACY, indictment for, 627.

CONTRACT:

1. A contract entered into whereby C agrees to devote his individual attention to the business of L's store, at a certain stipulated price per annum, is not a partnership transaction, but one between separate and distinct persons. It was the duty of the court in such case to interpret the instrument and not submit the question to the jury. *Covington* v. *Leak*, 133.

2. A contract made in violation of a penal statute is deemed to be illegal, and will not be enforced by the courts. Where such a contract furnishes a consideration of another promise, the latter will also be deemed illegal, even though it may be partially supported by other and legal considerations. *Covington* v. *Threadgill*, 186.

3. The penalty denounced by Bat. Rev., ch. 81, § 4, against one who sells liquor, on credit, in violation of the statute, is not limited to a forfeiture of the excess over the sum of ten dollars, but extends to the whole amount of "money credited." *Ib.*

4. A paper-writing as follows: You will please furnish threshing machines (describing them), to be shipped to Salisbury on or before May 1st, 1881, at a discount of 30 per cent. from price-list, to be paid by draft at date of shipment, &c., signed by both parties to the transaction, is a contract sufficiently explicit to support an action for its breach. *Crawford* v. *Mfg. Co.*, 554.

5. The measure of damages for a failure to furnish the machines is the difference between the contract price and their market value at Salisbury, on the first day of May, 1881, less the cost of transportation. *Ib.*

6. The expenses incurred by the plaintiff in sending an agent to the defendant in reference to the matter, are not to be included in the damages resulting from the breach of the contract. *Ib.*

7. The case is remanded, to the end that the damages may be assessed as herein directed. The verdict and judgment in other respects are not disturbed. *Ib.*

CONTRACT:

Of married women, 300.

Usurious, 344.

What the parties agreed, 526 (7).

Of infant, 650, 651.

CONTRACTS FOR PURCHASE OF LAND:

1. Where, under a contract of purchase, the vendor or his assignee seeks, in an action against the vendee or his assignee, to subject the land to the payment of the price, *it was held*, that the action is to enforce an equity in the vendor—not the payment of a debt or money demand—and the statutory bar does not apply. Distinction between statute of limitations and presumptions. *Lewis* v. *McDowell*, 261.

2. In such case, the land is charged with a lien for the unpaid purchase money, and the vendor's equitable claim cannot be defeated by a sale under execution of the vendee's interest and a seven year's possession thereunder by the purchaser. *Ib.*

3. The act of 1879, ch. 217, which requires the plaintiff, in an action to recover a debt for the purchase of land, to allege that the consideration thereof is the purchase money, does not apply to this case. *Ib.*

4. Nor is a survey of the land or allegation of demand on defendant to comply with contract, necessary. *Ib.*

5. A vendee of land let into possession, or a mortgagor who remains in possession, is entitled to rents in lieu of interest. *Wellborn* v. *Simonton*, 266.

6. Vendee, under a contract of purchase and bond for title, was let into possession of land and assigned his interest to B, who subsequently mortgaged the same to the plaintiff; the plaintiff foreclosed and brought suit against the mortgagor for the possession, when the original vendor came in as a party defendant, claiming title; *Held*, (1) That the mortgagor is estopped to deny the title of the plaintiff mortgagee. (2) The plaintiff has an equitable right to a conveyance of the legal title upon payment of the balance due the vendor. *Thompson* v. *Justice*, 269.

7. An action for damages for the non-performance of a parol contract for the purchase of land cannot be sustained. *McCracken* v. *McCracken*, 272.

8. A vendee under such a contract, who makes improvement upon the land, cannot maintain an action for their value against the vendor, provided the latter makes no use of them and is willing that they may be removed; all that the court can do, in such case, is to see that

the vendor shall derive no unconscionable advantage from his manner of dealing with the vendee. *Ib.*

9. In an action for specific performance of a contract for the purchase of land, it is no defence in the vendor to say that he has disabled himself to comply with the same: the vendee is entitled to judgment that the vendor make reasonable efforts to re-acquire the title and convey to him. *Welborn* v. *Sechrist*, 287.

10. The consideration of a contract to convey land need not be set out in the writing. *Thornburg* v. *Masten*, 293.

11. Where the contract is as follows: "Received of G. T. five hundred dollars on account of the sale of my interest in the 'Lenoir lands,' owned by myself and J. W. T."; *Held*, that the description is sufficient to admit parol evidence to identify the land. *Ib.*

12. A contract of purchase of land will not be specifically executed, where the memorandum thereof contains the words "one hundred acres," but fails to describe its boundaries. This imperfect description is a fatal defect, and cannot be aided by parol evidence. *Breaid* v. *Munger*, 297.

CONTRACT FOR LAND PURCHASE:

Homestead, 234.

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CONTRIBUTORY NEGLIGENCE, 502, 564.

CONTROVERSY WITHOUT ACTION:

What necessary to constitute, 54.
Jurisdiction in, 56 (3).

CORPORATIONS:

1. Municipal corporations are instrumentalities of the state for the administration of local government, and their powers may be enlarged, abridged, or withdrawn at the pleasure of the legislature, there being no contract or vested right involved. *Lilly* v. *Taylor*, 489.

2. The repeal of a town charter deprives its authorities of the power to levy taxes, or to collect taxes already levied, and puts an end to process for the enforcement thereof; but moneys collected and in hand may be controlled by the courts. *Ib.*

3. In such case, town property, such as public buildings, &c., is under the control of the state and not subject to town debts; nor can property of the individual citizen be so subjected except through taxation authorized by the legislature. *Ib.*

4. The summons in an action against a foreign corporation may be served either upon a local or general agent. Act 1875, ch. 168, and act 1877, ch. 157, construed. *Jones* v. *Insurance Co.*, 499.

5. Where a new corporation is formed out of two existing corporations, these latter ceasing thereafter to exist, the law forming the new corporation governs and controls its corporate functions and rights. *Railroad Co.* v. *Commissioners*, 519.

CORPORATIONS, construction of railroad, deflecting line of, 519.

COSTS, additional security for, 116 (1).

COUNTERCLAIM AND SETOFF, 148 (2, 4).

COUNTY COMMISSIONERS:

1. The board of county commissioners is not such a judicial tribunal, that its decision in passing upon claims against the county can be reviewed on appeal. The proper remedy to test the validity of a rejected claim, is by civil action. *Jones* v. *Commissioners*, 56.

2. Appeals from the decision of the board acting under the provisions of the revenue law, are recognized by the act of 1881, ch. 117, § 24. *Ib.*

COURSE AND DISTANCE, when to give way, 321.

CREDITORS' BILL, 438.

CREDITORS OF CITY, 489.

CROPS, indictment for disposing of, when under mortgage, 650.

DAMAGES:

Want of title in goods seized does not prevent recovery of, 27 (2).

Collision of steamer with boat, 123.

Injury from defective bridge over private way, 129.

Can be pleaded as setoff, 148 (4).

Not recovered for breach of parol land contract, 272.

Measure of, 547, 554, 560 (3), 564.

DECEIT, in sale of horse, action for in superior court, 190.

DECLARATIONS, 208:

Of grantor, 468 (2).

Of agent, 573.

Of defendant, 634, 639.

DEED:

From insolvent father to son, fraudulent, 209 (3).

Of surrender, 312.

Color of title, 326, 340.

Effect of unregistered, 333.

Assigning interest in crop, 214 (1).

Mistake in, corrected, 321.

Of married women, 305, 310.

Description of land in, 293, 297, 347, 357.

Of sheriff, operates from day of sale, 340, 391.

Must contain the word "heirs" to pass fee, 350.

See also, action to recover land.

DELAY, in shipment of freight, 547, 570.

DEVASTAVIT, 403.

DISPOSING of crop under mortgage, 650.

DISSENTING OPINIONS:

McCracken v. *McCracken*, 272—SMITH, C. J.

Lynn v. *Lowe*, 478—RUFFIN, J.

Owens v. *Railroad Co.*, 502—RUFFIN, J.

State v. *Nash*, 618—SMITH, C. J.

DIVORCE AND ALIMONY:

1. In divorce for alleged adultery, neither the husband nor the wife is a competent witness; nor shall the admissions of either be received as evidence to prove the fact. Bat. Rev., ch. 17, § 341. *Perkins* v. *Perkins*, 41.

2. Evidence of the physical condition of the party with whom the adultery is alleged to have been committed, was properly excluded where no acts of intimacy had been shown. *Ib.*

3. Condonation is forgiveness with a condition, that is to say, the offence is forgiven if the delinquent will abstain from the commission of a like

offence afterwards, and treat the forgiving party with conjugal kindness. *Gordon* v. *Gordon*, 45.

4. Where a separation takes place on account of the cruel treatment of the husband, and the wife returns upon the promise of better treatment on his part; *Held*, that his subsequent cruelty operates as a reviver of the original offence. *Ib.*

5. The amount of the alimony is discretionary with the court below. *Ib.*

DOWER:

1. A widow is entiled to dower only in an estate of inheritance, of which the husband had a seizin in law or a seizin in deed, at any time during the coverture; and therefore, she is not dowable of a reversion or remainder expectant upon an estate of freehold. *Houston* v. *Smith*, 312.

2. A particular estate of freehold may be surrendered to the remainderman by deed, but not by a parol agreement. *Ib.*

See also, pp. 230, 310.

EJECTMENT:

See action to recover land.

Tax title, 251 (2).

ELECTION, doctrine of, 581.

EMANCIPATION, 576 (3).

EMBEZZLEMENT, indictment for, 658.

ENDORSEMENT, of commercial paper, effect of, 151.

EQUITY:

In fraud cases, 256.

Equitable claim and lien, 261 (2), 269.

Equitable claim, abandonment of, 468.

Equitable title, 375, 383.

ESTATE:

1. Where one holding only a life estate in property sells the absolute interest, the remainderman has an equity to have the price received, with interest from the death of the life-tenant. *Isler* v. *Isler*, 576.

2. The money paid for a slave sold by a life-tenant takes the place of the property, and the remainderman is entitled to the same, at the death of such tenant, if he elect to ratify the sale. There is no distinction in principle between the destruction of such property by death or by emancipation. *Ib.*

EVIDENCE:

1. Where fraud in the execution of a deed is alleged, and the insolvency of the grantor inquired into, it was held competent on cross-examination to ask the witness if such insolvency was not well known in the grantor's neighborhood, as tending to discredit the witness. *Perry* v. *Jackson*, 103.

2. The manner of conducting the examination of witnesses on a trial is left to the discretion of the presiding judge, whose duty it is to see that no prejudice arises from the tone in which questions are asked, as tending to impeach their credit. *Ib.*

3. Evidence of the annual rental value of land for a period preceding the time to which the plaintiff's title extended, is competent to show an average value common to each year. *Ib.*

4. Proof that the value placed upon two tracts of land, in dispute in this case, was disproportionate to their actual value, is admissible upon the question of fraud. *Ib.*

5. In an action upon an account, made up of charges for goods sold upon written orders; *Held*, incompetent for the plaintiff to speak of their contents when the orders were not produced on the trial and identified. *Covington* v. *Steele*, 145.

6. A party's declarations and admissions pertinent to the issue are evidence against him, and if made in the presence and at the instance of others having a like interest with him, they are evidence against them. *Tredwell* v. *Graham*, 208.

7. Notwithstanding the statute, section 343 of the Code, one may testify to a transaction by the opposite party, when against his own interest. And though direct evidence of a conversation with a person deceased be incompetent, a rehearsal of the same in a conversation with a son of the deceased is competent under the facts of this case, as part of the *res gestæ*. *Ib.*

8. A deed made by an insolvent father to his son, in the presence of another son, nothing else appearing, is presumed to be fraudulent as to creditors. The burden to remove this presumption rests upon him who seeks to uphold the conveyance. A grantee in such case may protect his title by showing that he is a purchaser for value and without notice of the grantor's fraudulent intent. *Ib.*

9. Evidence of the relations of parties farming together and the contributions of each in the cultivation of crops, and that the portion of one was credited on his note to a third party, warranted the jury in the absence of direct proof in finding that the crops were to be divided between them. And, after making such agricultural agreement, the deed of assignment of one of them, mentioned in the case, conveys only his interest in the crop. *Stallings* v. *Lane*, 214.

10. It is competent to prove the handwriting and signature of a register of deeds to a certificate of registration, as *prima facie* evidence of his official character. *Thompson* v. *Justice*, 269.

11. Evidence that another committed the offence of which the defendant was being tried, is inadmissible. The defendant must show that he is innocent, not that another is guilty. *State* v. *Beverly*, 632.

12. Whether counsel should be stopped, in the use of improper language in addressing the jury, at the time, or in the charge to the jury, is matter of discretion with the judge. Remarks of counsel in this case are not objectionable. *Ib.*

13. A defendant who avails himself of the privilege of testifying in his own behalf, may be asked on cross-examination whether he has been convicted of certain criminal offences, with a view to affect his standing as a witness. *State* v. *Lawhorn*, 634.

14. And his declarations, pertinent to the issue, made in the hearing of a witness, are admissible against him. The rule excluding evidence, as being fragmentary, does not apply to such a case, but is confined to cases where proof is offered to show what a deceased person had said or testified to. *Ib.*

15. The law governing the defendant's right of self-defence was correctly stated by the court in charging the jury. *Ib.*

16. The admission of incompetent testimony, unless objected to at the time or forbidden by statute, is not the subject of an exception at a later stage of the trial. *State* v. *Pratt*, 639.

17. A defendant's declarations will not be excluded upon the ground that the witness did not hear the whole of the conversation of which they form a part. (See preceding case for rule in reference to fragmentary evidence). *Ib.*

EVIDENCE:

In land suit, see action to recover land.

In divorce cases, 41.

In fraud, 103 (3, 6), 207 (3).

Of rental value, 103 (5).

In fornication and adultery, 646.

Of agricultural relations, 214.

Of negligence, 560.

Agent and principal, 573.

Burnt records, 576.

In assault, 618.

EXCEPTIONS, what are, and must be taken in apt time, 15, 103.

EXCURSION TRAIN, 526.

EXCUSABLE NEGLIGENCE:

1. A judgment may be set aside, in whole or in part: the court is invested by the statute with full legal discretion over the matter. *Geer* v. *Reams*, 197.

2. A party defendant, whose attorney enters an appearance as counsel but fails to file an answer, is entitled to relief against a judgment taken for want of an answer, no laches being imputed to the party himself. *Ib.*

3. A party seeking to have a judgment set aside on the ground of excusable neglect, must at least set forth in his application such a case as *prima facie* amounts to a valid defence: whether the defence is valid, is a question to be determined by the court, not by the party. *Mauney* v. *Gidney*, 200.

4. There is a presumption in favor of the validity of every judgment of a court of competent jurisdiction, and the burden of overcoming it rests upon the party seeking to set aside the judgment. *Ib.*

5. In applications for relief under section 133, no distinction is made between adult and infant parties, provided the latter are represented according to the requirements of the law and the practice of the court. *Ib.*

6. A party is guilty of inexcusable neglect, and is not entitled to relief against a judgment rendered against him, where it appears that a summons was regularly served, and he paid no attention to the case

either in person or by attorney, even although he supposed he was not required by the law to answer the complaint until served with a copy. *Churchill* v. *Ins. Co.*, 205.

7. The court has the power to modify a final judgment, and make it one by default and inquiry. *Ib.*

See also, page 246.

EXECUTION:

One who buys at execution sale gets the mere legal title of the defendant in the execution, and is not entitled to be re-imbursed if he suffer loss by reason of a defective title. The right to compensation for such loss is where the purchaser buys at a judicial sale of property not belonging to the debtor, as provided in Bat. Rev., ch. 44, § 26. *Lewis* v. *McDowell*, 261 (2).

EXECUTION:

Sale of trust property, homestead, 243.
Sale of vendee's interest, effect of, 261 (2), 391.

EXECUTORS AND ADMINISTRATORS:

1. Where A purchased land at an administrator's sale, and, after paying a part of the purchase money, assigned his interest to B, taking from him a promise to pay the balance due the administrator and his bond for the part A had paid, and B afterwards assigned to the plaintiff for a valuable consideration; *Held*, that the plaintiff, upon payment of the balance *due the estate*, is entitled to receive a deed from the administrator for the land, unencumbered with any lien in favor of A. But the amounts paid by A, after plaintiff acquired his equitable title, being such as the plaintiff must have paid to get the legal title, operate as liens upon the land. *White* v. *Jones*, 166.

2. The plaintiff, in such case, having the right to the land, is entitled to the rents and profits. *Ib.*

3. Betterments and reparation of the premises touched upon, and the distinction noted. *Ib.*

4. Where the land of the ancestor is sold by a commissioner for partition among the heirs, within two years after letters of administration on the estate, and a deed executed after the two years; *Held*, that the land is still subject to the payment of the ancestor's debts. The deed in such case relates to the date of the sale, and not to the time of its execution. Bat. Rev., ch. 45, § 156. *McArtan* v. *McLauchlin*, 391.

5. A bond given by one as "administrator or executor" is binding upon him individually, and the sureties on his official bond are not liable for its payment. *McLean* v. *McLean*, 394.

6. The distinction between a promissory note and a bond given by one as personal representative, in reference to his liability, pointed out by ASHE, J. *Ib.*

7. An administrator having in his hands a fund derived from the sale of real estate, holds it for the heirs of the intestate, and, upon the death of such administrator, suit to recover the same may be brought by the heirs alone against his personal representative. *Alexander* v. *Wolfe*, 398.

8. But where, in addition to the proceeds of sale of real estate, there is also in his hands a fund derived from other sources, the administrator *de bonis non* of the original intestate should become a co-plaintiff with the heirs (unless as in this case they release their claim to the personal estate) in order to a recovery, in one action, of the full amount due both. *Ib.*

9. Where a *devastavit* is charged, the primary liability for the waste rests upon the administration bond, and a reference to ascertain the fact was properly ordered. *Hawkins* v. *Carpenter*, 403.

10. A failure to apply for license to sell land for assets is not of itself a breach of such bond. *Ib.*

11. Lands descended are not assets until a sale thereof and the receipt of the money by the administrator. *Ib.*

12. The administrator *de bonis non* is a necessary party to a suit against the former representative to recover unadministered assets. *Ib.*

13. The rule laid down in *Patton* v. *Farmer*, 87 N. C., 337, and other cases in reference to the management of trust-funds during the war, approved. *Covington* v. *Lattimore*, 407.

14. Where an executor, having confederate money of his own, pays his co-executor a debt due the testator's estate, there being no exigency requiring its collection and no collusion between them, and the amount is on the same day handed back to him to be held as a part of the assets; *Held*, that he cannot thereby shift a loss upon the estate, but is responsible for the debt. *Ib.*

15. While executors cannot sue each other at law, they may proceed in equity whenever necessary to protect the estate. *Ib.*

16. Where the same person is administrator and guardian, and an action is brought in behalf of the infant heirs against him and the sureties on his guardian bond, to recover their distributive shares, and no

exception is taken by the defendant on account of the non-joinder of the widow of the intestate as a plaintiff; *Held*, (1) That an action subsequently brought by the widow against him, as administrator, for her distributive share, is not demurrable for non-joinder of the heirs as plaintiffs. The defendant in such case acquiesced in a severance of the action. (2) Nor is the pendency of the suit on the guardian bond an obstacle in the way of the plaintiff, such bond not being a security for what is due her, and there being no identity between the parties or the cause of action. *Redfearn* v. *Austin*, 413.

17. An administrator is responsible for a debt due the intestate's estate, where it appears that the debtor occupied intimate family relations with him, and was engaged in business for some time, during which no steps were taken to collect the same and no excuse given for the neglect. *Wilson* v. *Lineberger*, 416.

18. An administrator is not chargeable with interest, where the proof is that he has not used the assets for his personal benefit, nor unnecessarily detained the same in his hands, and has kept an account of his receipts and disbursements. *Ib.*

19. The petition of a creditor of a decedent for an order to compel the personal representative to sell land for assets to pay debts, is not demurrable upon the ground that all the creditors of the estate are not made parties plaintiff. Such a proceeding is in effect a creditor's bill, and gives the complainant no preference over any other debt of equal dignity. *Sinclair* v. *McBryde*, 438.

20. A general judgment does not itself constitute assets to charge an administrator, and was properly refused in this case; but the plaintiff is entitled to judgment *quando*. *Rogers* v. *Grant*, 440.

21. Creditors of an estate, who fail to make claim in seven years after the debtor's death, are not barred by the statute unless the administrator avers and proves that he has paid over the surplus in his hands to parties entitled. (This case is governed by the law in force prior to the Code). *Ib.*

22. A petition to sell land for assets must contain the essential statement that there is an *insufficiency of assets* to pay the decedent's debts, together with the amount of debts and the value of the personal estate, as far as can be ascertained. *Blount* v. *Pritchard*, 445.

23. The petition may be filed at any time after the administrator ascertains that there is an insufficiency of assets.

24. License to sell may be granted, even if there has been no application of the personal estate to the debts; but if there has been an application, the petition should so state.

25. No debt being shown to exist against the defendant's intestate at the commencement of the action; *Held*, that the plaintiff could not maintain it. Suggestion as to the proper course of procedure to satisfy plaintiff's demand. *Brooks* v. *Headen*, 449.

26. Creditors of a deceased person, whose claims were due at the death of the debtor, are barred after seven years next after letters granted; provided the estate has been fully administered. *Morris* v. *Syme*, 453.

27. Whether, in the event of the death of an administrator, a creditor of the intestate can maintain an action against the sureties on the bond by making the administrator *de bonis non* also a party defendant (?). *Ibid.*

28. The statute of limitations may be pleaded by the heir against a debt of the ancestor, in a proceeding by the administrator for license to sell the descended lands for assets to pay the debt. The admissions of the administrator that the debt is just, and his declining to set up the statute as a defence, do not operate to deprive the heir of this right: there is no privity between him and the heir. *Bevers* v. *Park*, 456.

29. Whether the heir is bound by a valid subsisting judgment against the administrator, and to what extent he may contest the validity of the demand upon which such judgment is founded (?). *Ib.*

30. The court intimate that the legislature has no power to revive a claim to which the bar of the statute has once attached. The act of 1881, ch. 80, discussed by RUFFIN, J. *Ib.*

31. An administrator must apply, for license to sell land for assets, to the superior court of the county where the land or some part thereof is situated. Bat. Rev., ch. 45, § 61. *Ellis* v. *Adderton*, 472.

EXECUTORS AND ADMINISTRATORS:

Personal assets, 350 (3).

Statute of limitations may be set up by heir in petition to sell land, 464 (2).

When statute begins to run against, 478 (2).

Payment to, under void letters, 584 (2).

FALSE PRETENCE:

The indictment for false pretence in this case, and the proof to warrant the verdict of guilty, are supported by the decision in *State* v. *Eason*, 86 N. C., 674, and the cases there cited. *State* v. *Dickson*, 643.

FALSE WARRANTY, in sale of horse, action for, in superior court, 190.

FELONIOUSLY, 656.

FINES AND PENALTIES, when applied to school fund, 120 (2).

FORNICATION AND ADULTERY:

In fornication and adultery, evidence of acts anterior to the two years preceding the finding of the bill of indictment, is competent to be considered by the jury in connection with evidence of other acts of a like nature within the two years. *State* v. *Pippin*, 646.

FRAGMENTARY EVIDENCE, 634, 639.

FRAUD AND FRAUDULENT CONVEYANCES:

1. Where the fraudulent mortgagee reconveys the land to the fraudulent mortgagor, before any lien attaches in favor of the creditors of the former, they cannot subject the land to the payment of their debts. *Powell* v. *Ivey*, 256.
2. A fraudulent vendee is under no legal obligation to reconvey, though morally bound to do so; but a court of equity will give no aid where both the vendor and vendee participate in the illegal transaction. *Ib.*

FRAUD:

Evidence in, 103 (3, 6).

Presumption of, in deed, 209 (3).

Jurisdiction in case of, 246.

FRAUDULENT DONEE, of intestate may plead statute of limitations, 464 (2).

GOODS SOLD ON WRITTEN ORDERS, evidence of, 145.

GRANT, copy of, evidence, 315 (4)

GUARDIAN AND WARD:

1. The ward has a right to subject land sold by his guardian to the payment of the purchase money. *Murrill* v. *Humphrey*, 138.
2. A guardian's primary duty is to invest the trust fund, and he will be chargeable with interest in the absence of proof that it remained in his hands unemployed without his fault. *Wilson* v. *Lineberger*, 416.
3. Commissions allowed by a referee will not be reduced unless they are manifestly excessive. No extra charge for *personal* services of the

trustee, over the *actual* expenses incurred in the proper management of the fund, will be allowed. *Ib.*

GUARDIAN, there must be, otherwise judgment against infant irregular, 35.

Where the same person is guardian and administrator, duty of, 413.

HABEAS CORPUS:

A party, set at large by writ of *habeas corpus*, upon the ground that the judgment of imprisonment was void for want of jurisdiction in the court, may be again arrested for the same cause upon legal process of a court having jurisdiction—either to try or bind over. *Barbee* v. *Weatherspoon*, 19.

HANDWRITING, proof of, 269.

"HEIRS," necessary in deed to pass fee, 350.

HIGHWAY, indictment for obstructing, 647.

HOMESTEAD AND PERSONAL PROPERTY EXEMPTION:

1. The extent in value and duration of a homestead allotment, made in the bankrupt court, is the same as prescribed by the law of the state. *Windley* v. *Tankard*, 223.

2. A homestead is allowed against a judgment obtained on a new promise to pay a debt after the discharge of the defendant in bankruptcy in 1870. *Fraley* v. *Kelly*, 227.

3. A promise to pay a debt discharged in bankruptcy does not revive the original contract so as to re-invest it with an actionable quality, but only recognizes it as the consideration to support the new promise. *Ib.*

4. The homestead and personal property exemption are fixed by the constitution, and neither the value nor duration thereof can be increased or diminished by the legislature; therefore, the act of 1876–'77, ch. 253, in so far as it undertakes to change the same, is unconstitutional. *Wharton* v. *Taylor*, 230.

5. The land in dispute in this case may be sold, subject to the widow's dower, to pay the intestate's debt. *Ib.*

6. A party, whose contract for the purchase of land has not been discharged, is not entitled to homestead against a judgment obtained on the same; therefore, where the bargainee contracted with the bargainor to pay a note which the latter owed to a third person, in con-

sideration of a land purchase, *it was held* that the land is subject to the payment of such debt. *Fox* v. *Brooks*, 234.

7. The provisions of the law, securing a homestead and personal property exemption, are not *necessarily* void as against "old debts," but only so, in case they should defeat their payment in whole or in part. Even against such claims, the debtor has a right to have his allotments made and the excess sold and applied in payment thereof. *Albright* v. *Albright*, 238.

8. A judgment on a debt, made since 1868, rendered and docketed before one on a debt made anterior to that time, will not be displaced in favor of the latter, even to save the homestead, but operates as a first lien on the land not included in the homestead. *Ib.*

9. An actual levy of a junior judgment upon the debtor's personal property, though not privileged against the same, entitles the creditor to the fund arising from the sale of the excess; but the $500 exemption of personal property, whether set apart or not, is wholly exempt from the process. *Ib.*

10. The debtor, in such case, whose property was both under mortgage and judgment liens, has an equity to have the same sold to the best advantage, after all parties interested are brought before the court and their priorities determined. *Ib.*

11. Assignment of personal property to a trustee to secure creditors—the assignor reserving a sufficiency to make up his personal property exemption—the allotment to be made, before a final disposition of the trust fund, by free-holders in the manner prescribed by law; *Held*, that the title to the goods not required to make up the exemption, is in the trustee, and a sheriff has no right to levy upon and sell the same. *Brannon* v. *Hardie*, 243.

See also, page 310.

HOMICIDE:

In a joint trial for murder, it is the duty of the judge, if convinced that either prisoner is guilty of a less offence than that charged, to so instruct the jury, without regard to its effect upon the other prisoner. The assent of the solicitor given to a verdict of manslaughter as to one, the court in this case permitting it, is no expression of opinion as to the grade of the other's offence. *State* v. *Pratt*, 639.

See also, page 672 (6).

HOUSE-BURNING, indictment for, 656.

HUSBAND AND WIFE:

Deed of, 310.

Husband entitled to services of wife, 463.

ILLEGAL CONSIDERATION, 186.

IMPRISONMENT FOR DEBT, 3.

IMPROVEMENTS:

When tenant not entitled to, 91, 375 (2).

Distinguished from reparation, 167 (4).

Vendee under parol contract for land purchase, cannot recover value of, 272.

INDICTMENT:

1. Indictment for conspiracy in three counts—first, for conspiring to commit rape upon F; second, the like offence upon E; and third, the same upon "certain female persons to the jurors unknown"; *Held*, as there was no evidence of a common design, the defendants were entitled to a verdict of acquittal. *State* v. *Trice*, 627.

2. *Held further*, that the charge of the court, being, in effect, that the jury might convict upon the first two counts, unsupported by evidence, provided they thought the defendants guilty under the third count, is erroneous. *Ib.*

3. Distinction between cases where the indictment charges distinct offences in the different counts, as here, and those where the counts vary the same offence to meet the probable proofs, pointed out by RUFFIN, J. *Ib.*

4. Although the name of the person upon whom an offence is charged to have been committed, be to the jurors unknown, yet the proof must identify the party injured as completely as if his real name appeared in the indictment. *Ib.*

5. An indictment for obstructing "a certain public road and common highway," without specifying its particular location and terminal points, is defective. *State* v. *Crumpler*, 647.

6. An indictment under the act of 1873–'74, ch. 31, for disposing of crops under mortgage cannot be sustained, where it appears that the defendant is an infant. The alleged disposition was a disaffirmance of the contract and renders it void. *State* v. *Howard*, 650.

7. Though the act creating the misdemeanor, by its general terms, makes the defendant indictable for a violation of his contract, yet its opera-

tion is restricted by the common law which exempts him from the contract by reason of his infancy. *Ib.*

8. The case of *State* v. *Johnston*, 76 N. C., 209, approved, to the effect that an indictment for an assault with intent to commit rape (under Bat. Rev., ch. 32, § 5) is supported by proof that the assault was made upon a female under ten years of age. It is not necessary that the age should be stated in the bill. *State* v. *Staton*, 654.

9. Such offence is a misdemeanor, and to charge it as a felony, does not raise the grade of the offence. *Ib.*

10. An indictment for burning a house under the act of 1874–'75, ch. 228, which fails to charge the offence as having been *feloniously* done, is defective. The statute makes it a felony. *State* v. *Roper*, 656.

11. Indictment under Bat. Rev., ch. 32, § 93, for burning an *out-house* used as a store-house, the proof being that it was an old building located at a cross-roads and occupied as a store-house, but not enclosed or used in any way as a dwelling-house; *Held*, a fatal variance. This statute makes the offence a misdemeanor. *Ib.*

12. An out-house is one that belongs to a dwelling-house and is in some respects parcel of the same, and situated within the curtilage. *Ib.*

13. Where an exception is contained in the same clause of the act creating the offence, the indictment must show, negatively, that the defendant does not come within the exception. *State* v. *Lanier*, 658.

14. Hence, an indictment for embezzlement under Bat. Rev., ch. 32, § 16, must aver that the defendant is not an apprentice or within the age of eighteen years; and if drawn under section 136 of same chapter, it must be averred that he is not an apprentice or under the age of sixteen years. The latter act makes the offence a felony, punishable as in case of larceny. *Ib.*

15. On trial of an indictment for killing another's stock in the defendant's enclosure, not surrounded by a lawful fence, it appeared that the defendant recklessly shot at cattle in his corn field, to frighten and run them out, and killed the prosecutor's mule, which at the time he did not see, the corn being very high; *Held*, that he is criminally responsible. The carelessness with which the act was done supplies the place of criminal intent, whether the defendant had license from the owner of the cattle to shoot at them, or not. *State* v. *Barnard*, 661.

INFANT:

Judgment against, when set aside, 35, 200 (3).

Incapacity of, 383.

Indictment against, 650.

INJUNCTION AND RECEIVER:

1. An injunction granted before the issuing of the summons in the action is premature. *Trexler* v. *Newsom*, 13.
2. An injunction will not be granted where the matter is involved in another pending suit between the same parties, in which relief can be there had. A party in such case is not allowed to seek redress from the action of one court through the conflicting action of another court, or in a different and distinct proceeding in the same court. *Grant* v. *Moore*, 77.
3. An injunction will not be granted upon the facts in this case, as no injury will result to the plaintiff by a denial of the application. *R. R. Co.* v. *R. R. Co.*, 79.
4. The appointment of receivers is regulated by section 215 of the Code: where the applicant establishes an apparent right to property in dispute, which is in possession of the adverse party, and the same is in danger of being lost or materially injured, a receiver may be appointed before judgment. The solvency of the trustee here warranted the court below in refusing the motion. *Levenson* v. *Elson*, 182.
5. Allowing or refusing additional affidavits after argument begun, in such case, is matter of discretion in the presiding judge, and not reviewable. *Ib.*
6. In injunction, the court will require the party seeking relief to make a full discovery of the facts and use perfect candor in alleging them. *Phifer* v. *Barnhart*, 333.

See also, page 116 (3).

INSPECTION OF ENROLLED ACT, 698.

INSURANCE:

1. The plaintiff applicant for insurance made an approximate estimate, from memory, of amounts of insurance then existing on the property, to the defendant company's agent, who reported a definite sum to the company; the agent had authority to act upon verbal statements, and a policy was issued; *Held*, that the representation was not false, and that plaintiff is not responsible for the error of the agent in his report to the company. *Hornthal* v. *Insurance Co.*, 71.
2. The agent's actual knowledge of the additional insurance in this case, is in law the knowledge of the principal, and a waiver of the requirement prohibiting other insurance without the written consent of the company. *Ib.*
3. A provision in a fire policy rendering it void if the title to the property insured be changed in any way other than by succession by rea-

son of death, or if the policy be assigned without written assent of the company endorsed thereon, is reasonable and just. *Biggs* v. *Insurance Co.*, 141.

4. But it does not apply to a stock of goods disposed of in the ordinary course of trade, unless the sale be in mass, or a new member be admitted into the firm. *Ib.*

5. Whether the forfeiture of the policy extends beyond the insurance on the specific property sold, or the contract is entire (?). *Ib.*

INTENT, criminal, when supplied by carelessness, 661.

INTEREST:

Rents in lieu of, 266 (2).

Against administrator, 416.

IRREGULAR JUDGMENT, 478.

ISSUES OF FACT, 108.

JOINDER OF CAUSES OF ACTION, 22.

JUDGE'S CHARGE:

1. There is no law which prohibits a judge, in his charge to the jury, from pronouncing a dissertation upon such moral questions as are suggested by the incidents of the trial, provided the language is without prejudice to either party. *Stilley* v. *McCox*, 18.

2. In reference to title, where goods are seized, 27.

3. In trial for conspiracy, 627; murder, 639.

4. Interpret instrument, not submit to jury, 133.

5. Withholding judgment on verdict until note filed, 148.

6. Judge must make up case on appeal in both civil and criminal actions, 609, 611.

JUDGMENT:

1. A judgment taken against infant defendants is irregular and may be set aside at any time, where it appears there was no service of process upon them and no guardian appointed to protect their rights. *Larkins* v. *Bullard*, 35.

2. A judgment against a party upon whom no service of process has been made nor appearance entered, is absolutely void, and may be so treated without any direct proceeding to vacate it. *Condry* v. *Cheshire*, 375.

3. A judgment rendered against a party after his death is irregular, where there was service of process and appearance, but no suggestion of the death; and the same will be set aside, in a direct proceeding for that purpose, so that the representative may have an opportunity to resist a recovery. *Lynn* v. *Lowe*, 478.

4. The statute of limitations in such case begins to run from the date of the appointment of the administrator, and the plea of the statute must be set up in the answer. *Ib.*

5. A motion in the pending cause to vacate an unsatisfied judgment, is the proper proceeding for the aggrieved party. *Ib.*

6. Writs of error are abolished, and section 296 of the Code, in reference to appeals, substituted. *Ib.*

7. The court does not pass upon the *bona fides* of the deed mentioned in the case. *Ib.*

JUDGMENT:

Suit on, 95 (1, 2).

In personam, 300.

Quando, 440.

When heir can test validity of, 456 (2).

Presumption in favor of validity of, 200 (2).

For want of answer or failure to give bond, 116.

Setting aside in part, 197; modifying, 205 (2).

Where homestead is involved, 238 (2, 3).

Right of debtor in relation to, 238 (4).

Will not be disturbed, on rehearing, for fraud, 246.

JUDICIAL SALE:

1. Where a purchaser has notice of defects in the title to land sold (it being announced at the sale that only the intestate's interest was to be disposed of, and if he had no title the purchaser would get none), but executes notes for the sums bid; *Held*, the purchaser buys at his own risk, and is liable on his contract. *Ellis* v. *Adderton*, 472.

The surety upon the notes, in such case, who also had full knowledge of the fact, is also liable. *Ib.*

3. Compensation for loss by reason of defective title of purchaser, 262 (5).

JURISDICTION:

1. The jurisdiction of the clerks of the superior court, in the appointment of guardians of infants, &c., does not extend to a case where the petitioner asks for the custody of a child who had been placed by its mother under the control of another. *In Re Lewis*, 31.

2. The court intimate that a mother cannot make a disposition of her child, so as to confer upon another the right to its custody and control. *Ib.*

3. The correctness of the decision in *Jordan* v. *Coffield*, 70 N. C., 110, doubted. *Ib.*

4. Whether, under the provisions of the amended constitution in reference to the jurisdiction of the court over "issues of fact" and "questions of fact," a party has the *right* to have a cause, heretofore cognizable only in a court of equity, tried by the court without the intervention of a jury—*Quære.* *Leggett* v. *Leggett*, 108.

5. But where, in such case, a party has of his own accord accepted a trial by jury, he cannot afterwards have the same facts passed upon by the court. *Ib.*

6. The decision in *Meneely* v. *Craven*, 86 N. C., 364, to the effect that a counterclaim in excess of $200 cannot be entertained by a justice of the peace, affirmed. *Raisin* v. *Thomas*, 148.

7. Neither has a justice (nor the superior court on appeal) jurisdiction of a counterclaim in damages assessed, though voluntarily reduced to $200. *Ib.*

8. But where the court has jurisdiction, *it seems* that a claim sounding in damages can be used by a party as a set-off. *Ib.*

9. An action for deceit and false warranty in the sale of a horse is cognizable in the superior court, though the damages claimed amount only to fifty dollars. *Ashe* v. *Gray*, 190.

JURISDICTION:

Equity cases, not in justice's court, 300.

In affrays, 614.

Where city ordinance is violated, 692.

Peace warrant, 668.

Controversy without action, 56 (3).

In cases of arrest, 19.

In fraud cases, 246.

JURY:

1. A tales-juror is required to possess the same qualifications as one of the regular panel, with the additional one of being a freeholder. *State* v. *Whitley*, 691.
2. The act of 1879, ch. 12, authorizing the foreman of the grand jury to swear witnesses to be examined before it, does not withdraw the authority from the clerk of the court. *State* v. *White*, 698.
3. In passing upon the matter of exception, the court by inspection of the enrolled act, in the office of the secretary of state, found that the word "duly," in the printed act, should be read "only." *Ib.*
4. Standing aside jurors in capital cases, 671.

JUSTICE OF THE PEACE:

No jurisdiction in equity cases, 300.

Jurisdiction in peace warrant, 668.

Warrant of, when sufficient, 671 (3).

See Jurisdiction.

JUSTIFICATION IN ASSAULT, 618.

LANDLORD AND TENANT:

1. The statute gives a landlord the title to the crop until the rent is actually paid (whether the claim be reduced to judgment or not), and such title is not impaired by the fact that the tenant conveys the crop to a third person, who takes without notice of the lanlord's claim. The rule *caveat emptor* applies. *Belcher* v. *Grimsley*, 88.
2. The relation of landlord and tenant being established, the tenant is not entitled to compensation for improvements put upon the land during his occupation, as lessee, where he believed he was entitled to the possession for the lessor's life, when under the contract he was not; nor is the rule modified by the fact that the lessor silently acquiesced in the putting up the improvements. *Dunn* v. *Bagby*, 91.
3. The statute, Bat. Rev., ch. 17, § 262 *a*, is not applicable to a case like this, and does not protect the tenant from the consequences of his misconstruction of the effect of the contract. *Ib.*
4. Agreement to cultivate land, 83 (3, 4); evidence, 214.

LARCENY:

1. "If the defendant did not make the tracks, who did? If he did not make them, and they were made by another, the defendant ought to

show it"; *Held*, that these remarks of the solicitor in his argument to the jury on a trial for larceny, where there was proof that the tracks about the premises corresponded with those made by the defendant at another time and place, were not objectionable, especially when the exception is taken after verdict. *State* v. *Johnston*, 623.

2. The solicitor has the right, by leave of court, to enter a *nolle prosequi*, after a general verdict of guilty, to one of the counts in an indictment for larceny and receiving. *State* v. *Morgan*, 701.

3. Where the defendant is apprehended *immediately* after the larceny, with the stolen goods in his possession, it is a *violent* presumption of his having stolen them, and the court should instruct the jury that, *in law*, he is guilty. *State* v. *Jennett*, 665.

4. Where he is found in possession some time after the larceny, and refuses to account therefor, it is a *probable* presumption, and a question of fact for the jury. *Ib.*

5. But where he is not found in possession recently after the loss (here eighteen months), it is a *light or rash* presumption, and not sufficient to warrant conviction, unless the attending circumstances tend to implicate the defendant in the larceny, as where he makes false statements in respect to his possession. *Ib.*

LEGISLATIVE POWER, over statute of limitations, 456 (3).

LIEN FOR PURCHASE MONEY, 167 (2).

LIFE-TENANT, sale of absolute interest by, 576.

LIQUOR-SELLING, on credit-forfeiture, 186 (2).

LIVE-STOCK, indictment for injury to, 661.

MARRIED WOMEN:

1. An action against a married woman, upon a promise to pay for work done on premises owned and held as her separate estate, is not cognizable in the court of a justice of the peace. Such court is a common law court, and its jurisdiction does not therefore embrace causes of an equitable nature. *Dougherty* v. *Sprinkle*, 300.

2. At law she cannot bind herself personally, and hence her contract will not be enforced against her *in personam*, but equity will so far recognize it as to make it bind her separate estate, and will proceed *in rem*

against it; such estate, being regarded as a sort of artificial person created by the courts of equity, is the debtor and liable to her engagements. *Ib.*

3. The complaint, in an action upon the contract of a married woman, must allege that she is possessed of a separate estate, and that the contract is such as the statute renders her competent to make, and that it is for her advantage. *Ib.*

4. The acknowledgment and privy examination of a married woman in executing a deed for her land, in 1844, is ineffectual to bar her, where, by reason of her inability to attend the county court, a commission to take the probate issued to a single justice: the statute required it to be issued to two or more commissioners. Rev. Stat., ch. 37, construed in *Burgess* v. *Wilson*, 2 Dev., 306. *Malloy* v. *Bruden*, 305.

5. A deed of the husband, without the joinder of his wife, conveying lands owned by him before the adoption of the constitution of 1868, the marriage being prior to that date, passes his estate free from the claim of dower and homestead. *Reeves* v. *Haynes*, 310.

6. A husband is entitled *jure mariti* to the services and earnings of the wife: the constitution of 1868 and the "marriage act" do not have the effect of changing this rule of law. *Syme* v. *Riddle*, 463.

MASTER AND SERVANT, relation exists between owner of vessel and pilot, 123.

MEASURE OF DAMAGES, 547 (2), 554, 560 (3).

MENTAL CONDITION OF GRANTOR, evidence of, 361.

MERGER, of debt into judgment, 95.

MORTGAGE:

Mortgagee sells and conveys to one who reconveys to him; *Held*, (1) That his possession under such deed is not adverse to the mortgagor, for he was entitled to the possession upon the default of the mortgagor. (2) While a trustee cannot buy at his own sale, either directly or through an agent, yet the *cestui que trust* may elect to affirm the sale. (3) The mortgagor or his representatives, in such case, can call upon the mortgagee for an account at any time within ten years after the cause of action accrues. *Bruner* v. *Threadgill*, 361, 362.

MORTGAGOR AND MORTGAGEE:

Right of mortgagor, 238 (4).

Fraudulent, effect of deed by, 256.

Mortgagor entitled to rent, 266 (2).

Mortgagor estopped to deny title of mortgagee, 269.

MOTION IN THE CAUSE, 13, 478 (3).

MUNICIPAL CORPORATION, 489.

MURDER, charge of judge in, 639.

NATURAL OBJECT, 357.

NEGLECT OF ATTORNEY, 62, 197 (2).

NEGLIGENCE:

1. In an action by an engineer, in the service of a railroad company, for damages for injuries sustained by reason of the company's failure to keep its road-bed in order; *Held*, to be error in the court to instruct the jury that the burden of proof rested upon the defendant to show contributory negligence on the part of the plaintiff. The conflicting decisions upon this subject discussed. *Owens* v. *Railroad Co.*, 502.

2. The *prima facie* evidence of negligence on the part of a railroad company in a suit for damages for killing stock (Bat. Rev., ch. 16, § 11) is not impaired by a local act requiring stock to be fenced in, but the defendant must repel the presumption by satisfactory proof to the jury. *Roberts* v. *Railroad*, 560.

3. The fact that the "stock law" makes it unlawful for the plaintiff to permit his cow to run at large, affords no excuse for an injury to her resulting from the defendant's negligence. *Ib.*

4. The measure of damages in such case is the difference in the value of the cow and that of the beef. *Ib.*

5. Where an injury results from negligence and the act of the plaintiff is directly connected and concurrent with that of the defendant, the plaintiff's negligence is the proximate cause of the injury and will bar his recovery in a suit for damages; but where the negligent act precedes that of the defendant, it is the remote cause, and the defendant will be liable if the injury could have been avoided by the exercise of reasonable care. *Farmer* v. *Railroad*, 564.

6. Plaintiff's mule was killed by defendant's train; *Held*, that even if the plaintiff was guilty of contributory negligence in turning the mule out of his enclosure, he is entitled to recover damages if defendant could have prevented the accident. But the plaintiff had the right to turn out the mule, and the act can in no sense be considered as contributory negligence.

7. The law in reference to "common of pasture" touched upon and discussed by ASHE, J.

8. Negligence of railroad, 536 (10, 12); see also, Railroads.

NEGOTIABLE INSTRUMENTS:

1. Negotiable paper endorsed by payee, and then appears the name of another person upon it; *Held*, that such person is an endorser. *Lilly* v. *Baker*, 151.

2. An endorsement in blank should be filled, by order of court, before judgment rendered. *Ib.*

3. Effect of endorsement in blank at the time the note is made, and after its delivery to payee—upon negotiable and non-negotiable paper—liability of signers, whether bound as original promissors, guarantors or endorsers—application of the rule announced to "accommodation paper"—pointed out and discussed by ASHE, J. *Ib.* See *Raisin* v. *Thomas*, 148.

NEW PROMISE, 227.

NEW TRIAL, for inconsistent verdict, 156.

NOLLE PROSSEQUI, right of solictor to enter, 701.

NOTES AND BONDS:

Where the note in suit was given for two other notes which were not surrendered; *Held*, that the judge committed no error in allowing a verdict for the plaintiff and withholding judgment thereon until the notes were produced and filed in court. *Raisin* v. *Thomas*, 148. See also *Lilly* v. *Baker*, 151.

NOTICE:

Of equity, 383, 388.

Of defective title, 472.

OBSTRUCTING ROAD, 647.

OFFICE AND OFFICER:

1. One acting in an official capacity is presumed to have been duly appointed to the office. *Thompson* v. *Justice*, 269.
2. Evidence relating to, 269 (2), 315.
3. Officer, when bound to obey warrant, 671 (5).

OFFICIAL BONDS, suit on, brought in name of state, 29.

OUT-HOUSE, what is, 656 (3).

PARENT AND CHILD, custody of child, 31.

PAROL CONTRACT, for land purchase, action for breach of, cannot be sustained, 272.

PAROL TRUST, 108 (3).

PARTICULAR ESTATE, of freehold, surrendered by deed, 312 (2).

PARTIES:

1. Suits upon official bonds made payable to the state must be brought in the name of the state. Bat. Rev., ch. 80, §§ 10, 11. The statute requiring the real party in interest to prosecute does not apply to such actions. *Carmichael* v. *Moore*, 29.
2. In suits against executor or administrator, 398, 403, 438, 453, 602.

PARTITION:

Equality, according to value of land at time of division, 38.

Sale of land for, 391.

PARTNERSHIP:

1. A partnership exists, where there is a common liability for losses and a common participation in the profits, as profits, after the payment of expenses. *Day* v. *Stevens*, 83.
2. A partnership, regulating the relations and interests of the members among themselves, is not the same as one formed and acting as such in its relations to others. *Ib.*
3. Where the landlord furnishes the land and teams and feed for them, and the tenant supplies the labor and provisions for the laborers, in

the cultivation of a crop—the gross product to be divided between them, without any account of expenditures made by either; *Held*, that the agreement does not constitute an agricultural partnership. *Ib.*

4. The statute expressly provides that the lessor, by reason of his receiving a share of the crop, shall not be regarded as a partner of the lessee. *Ib.*
5. *Curtis* v. *Cash*, 84 N. C., 41, explained and corrected. *Ib.*
6. Where the contract is personal, 133.
7. Where one partner can buy of the other, 350.

PASTURE OF COMMON, 564.

PEACE WARRANT:

1. A peace warrant is a criminal action prosecuted by the state, at the instance of an individual, to prevent an apprehended crime against his person or property, and is placed by the act of 1879, ch. 92, within the exclusive jurisdiction of a justice of the peace. *State* v. *Oates*, 668.
2. Where, in such case, the condition of a recognizance, in the sum of $300, was broken, *it was held* to be competent for the justice to declare the same to be forfeited and order it to be prosecuted in the court having jurisdiction of the penal sum. Bat. Rev., ch. 33, §§ 103, 106. *Ib.*

PENAL STATUTE, violation of, 186.

PETITION TO REHEAR:

Upon petition to rehear, this court will not disturb the judgment upon the ground of alleged fraud: an independent action to that end should be brought in the superior court. Nor do the facts here constitute a case of excusable neglect. *Grant* v. *Edwards*, 246.

PETITION TO SELL LAND FOR ASSETS, what to contain, 445; where filed, 472 (3).

PILOT, liability of for damages, 123.

PLEADING:

1. A complaint containing several causes of action, which constitute a series of transactions connected together and forming one course of dealing, is not demurrable; and where different causes of action are of the same character and between the same parties litigant, and the

joinder thereof is convenient to them, the court will usually refuse to entertain an objection to the joinder. *King* v. *Farmer*, 22.

2. A complaint alleging that defendant seized plaintiff's goods and appropriated them to his own use, charges both a trespass and conversion, and constitutes a cause of action under the present system of procedure. *Hill* v. *Buxton*, 27.

3. Where, in such case, the judge charged that if the jury should find that the property was taken from the *possession* of the plaintiff by force and against his will, he would be entitled to recover some damage, although he had no title; *Held*, no error. *Ib.*

4. Where pleadings are amended by permitting a defendant to make a case against his co-defendants, involving a change of the subject matter of the original suit, it amounts to bringing a new action on his part, and the defendants cannot be restricted in their pleas, but may set up any legal defence, as a matter of right. *Gill* v. *Young*, 58.

5. Where a judgment is recovered for a debt due by bond, the debt is thereby changed into a matter of record, and the plaintiff's remedy is upon the latter security, while it remains in force. *Grant* v. *Burgwyn*, 95.

6. The pendency of such judgment may be set up by the defendant as a bar to another action upon the same bond. *Ib.*

7. A plaintiff will not be allowed to abandon the averments in the complaint, and recover upon a collateral statement of facts contained in the defendant's answer. *Ib.*

8. No amendment of pleading is allowed, where the cause of action as proved is wholly variant with that alleged. C. C. P., § 130. *Ib.*

9. Whether the court has a discretion to refuse an amendment in case of a partial or immaterial variance (?). *Ib.*

10. But where plaintiff voluntarily amends his complaint by entering a *nol. pros.* as to certain causes of action, it is a matter of discretion in the court, whether he shall re-instate them. *Ib.*

11. A variance between the allegation and the proof in a civil action is immaterial, unless it be shown to the court that the adverse party has been misled. C. C. P., § 128. *Lilly* v. *Baker*, 151.

12. A pleading containing a denial—that every allegation of the opposite party "is corruptly false"—should not be received. The court condemn the use of the offensive language, and say that the pleading should have been removed from the files and reformed, according to the established rules. *Mitchell* v. *Brown*, 156.

13. In slander, the complaint must set out the objectionable words spoken, not simply a narrative of what occurred on a certain occasion; and

they must amount to a direct *charge*, not a mere *suspicion* of the commission of the alleged offence. *Burns* v. *Williams*, 159.

14. A complaint containing two unconnected alleged causes of action against different persons, is demurrable. *Ib.*

15. An answer which fails to state separately the distinct grounds of defence will be rejected, if exception is taken at the proper time. *Keathley* v. *Branch*, 379, 380.

PLEADING:

In ejectment, 261 (3), 379.

Contract of married woman, 300 (3).

Petition to sell land for assets, 438.

POWERS:

The power of a sheriff to sell land under execution, of a clerk under order of court, or of a special commissioner, is a bare power disconnected with any estate in the land; the deed of such officer, whenever made, refers to the power itself, and the purchaser takes from the time of the execution of the power and not from the date of the deed. (Distinction drawn between common law powers and such as operate under the statute of uses). *McArtan* v. *McLauchlin*, 391.

PRACTICE:

1. A motion in the cause will not lie where the proceeding shows there were two separate judgments constituting distinct causes of action, as it cannot be seen to which the motion is applicable. *Trexler* v. *Newsom*, 13.

2. Exceptions taken, after verdict, to issues, to evidence, or to the charge, will not be entertained; and exceptions to the making up the case on appeal cannot be taken here. *Tayloe* v. *Steamship Co.*, 15.

3. The court will not hear a controversy without action, under section 315 of the Code, in the absence of an affidavit that the same is real and in good faith to determine the rights of the parties. *Grant* v. *Newsom*, 81 N. C., 36, approved. (Other irregularities, in reference to the manner in which the cause was conducted as shown by the record, pointed out). *Wilmington* v. *Atkinson*, 54.

4. A controversy without action must be submitted to a court which would have had jurisdiction if the action had been commenced by summons; and it must also appear by affidavit that the same is real and in good faith. *Jones* v. *Commissioners*, 56.

5. The court has power in a proper case to order the defendant to give additional security for costs, and, on failure to comply with such order, to strike out the answer and award judgment. *Vaughan* v. *Vincent*, 116.

6. Where a special proceeding is transferred to the superior court for the trial of issues raised by the pleadings, and the answer is stricken out, the jurisdiction of the superior court ceases, there being then no issue to try. In such case a *procedendo* should issue to the probate court. *Ib.*

7. The appointment of a receiver was not warranted under the facts of this case. *Ib.*

8. Errors assigned must be specifically pointed out, or no correction will be made. *Strickland* v. *Draughan*, 315.

9. The court condemn the practice of judges and members of the bar in incorporating superfluous matter in the statement of the case on appeal, and again suggest the propriety of stating only those facts which are pertinent to the exceptions taken upon the trial. *Ib.*

10. Where no error appears, judgment will be affirmed. *State* v. *Rouse*, 682.

PRESUMPTIONS IN LARCENY, 665.

PRINCIPAL AND AGENT, 141, 194 (3).

PRINCIPAL AND SURETY, 214 (2).

PRIVATE PROPERTY, appropriation of, 686.

PRIVATE ROAD, damages against owner of, 129.

PROBATE OF DEED, 315.

PROBATE OF WILL, 584, 592.

PROCEDENDO, 116 (2).

PROCESS:

Judgment void without, 375 (3).

Summons against corporation, how served, 499.

PURCHASER:

Parol agreement, 108 (3).

For value and without notice, 383, 388.

Notice of defective title, 472.

QUESTIONS OF FACT, 108.

RAILROADS:

1. Variations in a route over which a railroad may run, do not affect the identity of a corporate body that builds it, where subsequent acts are amendatory of the original charter and give permission for a deflection from the line first projected; and the right to exemption of property from tax granted in the original charter, is retained unimpaired. *Railroad Co.* v. *Commissioners*, 519.

2. Railroad companies can make reasonable regulations for the management of trains. *McRae* v. *Railroad*, 526.

3. The purchaser of a ticket is bound to inform himself of such regulations, and must conform to the custom of the road in transporting passengers. *Ib.*

4. A regulation that persons purchasing tickets for an excursion shall travel upon the train provided for that special purpose, and not upon a regular train, is a reasonable regulation. *Ib.*

5. The managers of an excursion from Wilmington to Washington contracted with the defendant company for a train of cars at a certain sum, and after advertising the time, &c., sold card-tickets at $6.50 for the round trip; after the departure of the train and when it had proceeded a few miles, the defendant's conductor passed through the cars and took up the card-tickets, and in lieu thereof gave coupon-tickets in order that the connecting roads might hold vouchers to obtain their *pro rata* share of the excursion money, in settling with the defendant; *Held*, that this did not change the original contract with the managers. *Ib.*

6. The terms of the contract, contained in the coupon-ticket, did not confer the right upon the plaintiff excursionist to return on a regular train, even at an earlier day than that advertised for the excursion, without paying the regular fare. *Ib.*

7. In a suit by the plaintiff against the company to recover damages for an assault by the conductor who attempted to put him off a regular train unless the fare was paid, the plaintiff testifying, among other things, that he supposed he had the right to return on any train after the delivery of the coupon-ticket, but was compelled to pay additional fare for such privilege, *it was held* error in the court to

charge the jury that they might consider the understanding and agreement of the parties in determining the character of such ticket—there being no evidence of any agreement between the plaintiff and defendant. *Ib.*

8. *Brunhild* v. *Freeman*, 77 N. C., 128, to the effect, that the construction of a contract depends upon what both parties *agreed*, not upon what either *thought*, approved. *Ib.*

9. A railroad company has a right, and it is its duty, to establish and enforce reasonable rules and regulations for the government and direction of trains; and of such, the passenger must inform himself and conform thereto. *Britton* v. *Railroad*, 536.

10. The company cannot relieve itself of responsibility for injuries received by a passenger, where it is shown that such rules were not enforced, but their observance left discretionary with the passenger. *Ib.*

11. The right of a railroad company to assign white and colored passengers to separate, though not unequal accommodations, is recognized by the courts. *Ib.*

12. The company owes to every passenger the duty of protecting him from the violence and assaults of his fellow-passengers or intruders, and will be held responsible for its own or its servants' neglect in the premises, when the same might have been foreseen and prevented by the exercise of proper care. The plaintiff in this case was entitled to have the jury instructed that taking the evidence to be true, the company is liable in damages for the injuries sustained. *Ib.*

13. The defendant company gave a bill of lading to plaintiff at Greensboro, for transportation of goods *via* Charlotte to Burnsville, Ala., in which it was stipulated that the same are to be transported and delivered to the agents of connecting roads, and by them to the next connecting road, until the goods shall have reached the point named in the receipt, assuming no other responsibility for their safe carriage than may be incurred on its own road or at its own stations. The goods, on arrival at Charlotte, were delivered to the Charlotte, Columbia & Augusta road, and delayed in reaching the point of final delivery beyond the usual time required in transportation; *Held*, in an action by plaintiff for damages caused by the delay, (1) That the defendant, having the control and operating the C., C. & A. road itself, received the goods at Charlotte, and is liable to the plaintiff, in the absence of proof to show that the detention of the goods occurred beyond the southern terminus of the last mentioned road. (2) The duty of safe carriage attaches as the goods pass into the custody of each company, and ceases only when they are safely delivered to its successor. *Lindley* v. *Railroad*, 547.

14. The measure of damages occasioned by delay in shipment of goods, where the carrier is not informed of the special circumstances causing the loss of the plaintiff's contracts with others, is the difference between their market value at the time they ought to have been delivered, and the time they were in fact delivered, if in equally good condition; and if not, the damages should be increased to the extent of the deterioration resulting from the delay. *Ib.*

15. The verdict as to damages only is set aside and that issue re-opened to the end that an inquiry thereof may be made in the court below, according to the rule above announced. *Ib.*

16. A railroad company is liable in damages sustained by reason of a delay in the shipment of freight. *Branch & Pope* v. *Railroad*, 570.

17. Where it refuses to *receive* freight tendered for transportation, an action for the penalty of fifty dollars, as provided by the act of 1879, ch. 182, may be brought. *Ib.*

18. Where the action is for the penalty for allowing freight when received to remain unshipped for more than five days, as provided by the act of 1874-'5, ch. 240, § 2; *Held*, the "five days" mean five full running days, exclusive of the day of delivery and the day of shipment. *Ib.*

19. The clause in a bill of lading that the goods will be shipped "at the convenience of the company," will not protect it from liability for an unreasonable delay. *Ib.*, 573.

20. Service of process upon, 499; negligence of, 502.

RAPE, indictment for assault with intent, &c., 654.

RECEIVER, 116 (3); appointment of, 182.

RECENT POSSESSION, 665.

RECOGNIZANCE; for appearance, forfeiture of, 668.

1. A bond taken by the sheriff in a sum fixed by the court and made payable to the state, with condition to be void if the defendant make his personal appearance, &c., is valid as a recognizance. *State* v. *Jones*, 683.

2. Where the defendant in such case failed to appear and judgment *nisi* was entered, and the sureties to the bond appeared in answer to a notice by *sci. fa.* and defended the action; *Held*, that the judgment absolute rendered against them is not irregular. *Ib.*

3. Forfeiture of, 668.

RECORDARI, when to move for, writ of, 62.

RECORDS:

1. Whenever there is a discrepancy between the certificate of the clerk of a court and the record, the latter controls. *Malloy* v. *Bruden*, 305.
2. The transcript of a record on appeal must show the matters at issue in the case; they cannot be supplied by a reference to those in the record of another case. *Branch* v. *Railroad*, 573.
3. Under the act in reference to burnt or lost records, the recital of a record contained in a deed executed by virtue of court proceedings prior to 1865, is *prima facie* evidence of the existence and validity of the record; and the deed, of the decree upon which it purports to be founded. Bat. Rev., ch. 14. *Isler* v. *Isler*, 576.

REFERENCE AND REFEREES:

1. A reference for an account should not be ordered before passing upon a defence set up, which, if sustained, may put an end to the controversy. *Com'rs* v. *Raleigh*, 120.
2. A referee's estimate of the value of board and lodging will not be disturbed, where there is no agreement as to the price. *Wellborn* v. *Simonton*, 266.
3. Allowance of commissions by referee, 416 (4).

See also, page 403.

REGISTER OF DEEDS, proof of signature of, 269 (2).

REGISTRATION OF DEED, 315.

REHEAR, petition to, 246.

REMAINDER AND REVERSION, rights of tenant, 576; where dower right is involved, 312.

RENTS AND PROFITS:

Title to, 167 (3).

Vendee entitled to, 266 (2).

Evidence of rental value, 103 (5).

REPARATION AND IMPROVEMETS, distinction between, 167 (4).

REPEAL OF STATUTE, 499 (2).

RETAILING ON CREDIT, 186 (2).

REVENUE MATTERS, appeal from order of county commissioners, 56 (2).

ROADS AND BRIDGES:

1. A private-way was opened by the defendant for his own convenience and a bridge built over a creek which ran across it, and the public used the same with his knowledge and permission; the plaintiff sustained injury caused by the breaking in of the bridge, which the defendant knew to be unsafe, but which was apparently in good condition; *Held*, he was liable to the plaintiff in damages. *Campbell* v. *Boyd*, 129.
2. The duty of reparation and the liability for neglect in such cases, rest upon the defendant, by whose implied invitation the public used the way. *Ib.*
3. The defendant was convicted for obstructing a public highway, where it appeared that the same was established by a regular proceeding instituted for that purpose; the defendant was appointed and acted as overseer for one year, but failed to open the road; his successor did open it, and in so doing removed the fences which crossed it on the defendant's premises; the defendant replaced these fences, thereby obstructing the road; *Held*, that the conviction was proper. *State* v. *McIver*, 686.
4. The rule in this state in reference to the appropriation of private property to public use, is, not that the compensation to the owner shall precede the act of appropriation, but that provision shall be made by which he shall certainly and ultimately be paid. *Ib.*
5. Indictment for obstructing road, 647.

SALE OF LAND BY COMMISSIONER, deed operates from day of sale, 391.

SCHOOL FUND, what fines applied to, 120 (2).

SCIRE FACIAS, a notice, 683.

SECTION 133—See pages 197 *et seq.*

SECTION 343—See pages 208 (2), 592, 593.

SELLING LIQUOR, on credit, 186 (2).

SERVICE OF PROCESS, judgment void without, 375 (3).

SET-OFF, claim sounding in damages used as, 148 (4).

SHERIFF:

Deed of, operates from day of sale, 340, 391.

When bound to obey warrant, 671 (5).

SHIPPING AND PILOTAGE:

1. The relation of master and servant exists between the owner of a vessel and a licensed pilot, temporarily taking the master's place in controlling the navigation of the vessel. *Saulter* v. *Steamship Co.*, 123.
2. Where a steamer collided with the plaintiff's boat lying at a wharf, there being room for the steamer to leave its mooring without the danger of collision; *Held*, that the owner of the steamer is liable to the plaintiff in damages for the injury sustained. *Ib.*
3. The pilot is individually liable only where he is in actual charge and solely at fault; and this must be affirmatively shown, together with the fact that there was no fault on the part of the officers and crew of the colliding vessel, to relieve its owner of the *prima facie* liability for the accident; and any concurring negligence with the fault of the pilot will not exempt the owner. *Ib.*

SIGNATURE, of Register, proof of, 269 (2).

SLANDER, pleading in, 159.

SOLICITOR, can enter *nol. pros.*, when, 701.

SPECIAL PROCEEDING, 116 (2).

SPECIFIC PERFORMANCE:

Of parol trust, 109 (4).

Of contract for land purchase, 287, 297.

STANDING ASIDE JURORS, 671 (2).

STATEMENT OF CASE, preparation of, 315 (6).

STATUTES:

1. The law does not favor a repeal, by implication, of a former act. Some notice of the former act must be taken, indicating an intention to repeal it; or there must be repugnance in the acts. *Jones* v. *Insurance Co.*, 499.
2. Inspection of enrolled bills in secretary of state's office, 699 (2).

STATUTE OF LIMITATIONS:

1. The period from May 20th, 1865, to January 1st, 1870, shall not be counted to bar actions, or to presume satisfaction or abandonment of rights. *Bruner* v. *Threadgill*, 361, 362.
2. The statute of limitations may be pleaded by a fraudulent donee of the intestate, in a proceeding by the administrator for license to sell lands for assets to pay the debt of the intestate. (See preceding case). *Syme* v. *Riddle*, 463, 464.
3. The statutory presumption of abandonment of an equitable claim to land, arising within ten years after the right of action accrues, is fatal to the plaintiffs upon the facts of this case. Rev. Code, ch. 65, § 19. *Headen* v. *Womack*, 468.

STATUTE OF LIMITATIONS AND PRESUMPTIONS:

Distinction between, 261.

Against creditor of estate, 440, 453.

When heir allowed to plead, 456.

Legislative power over, 456 (3).

When statute begins to run, 478 (2).

STOCK LAW, 560, 564.

SUMMONS, against corporation, upon whom served, 499.

SURETY AND PRINCIPAL:

Where additional security is given by the principal debtor, with no understanding for further time, and the remedy to enforce collection remains as before; *Held*, that the surety is not thereby discharged; such security enures to the advantage of the surety. *Stallings* v. *Lane*, 214.

SURETY:

To appeal bond liable to judgment rendered, 7.

On administration bond, liability of, 394.

Notice to, 472 (2).

TALES-JUROR, qualification of, 691.

TAXATION:

1. Property cannot be listed or taxed for any year preceding a current year. *Johnson* v. *Royster*, 194.

2. The act of 1879, authorizing the collection of taxes and arrears due the city of Raleigh for the three years preceding its passage, does not confer the right to collect a tax upon property not listed according to the law. *Ib.*

3. Land should be listed for taxation in the name of the individual owners, and not in the name of the "estate" of one deceased. *Morrison* v. *McLauchlin*, 251.

4. A tax-title derived by a purchaser at sheriff's sale of land listed in the name of the "estate" of one deceased, is defective: the law requires personal service of notice of levy and sale upon the delinquent tax-payer. *Ib.*

4. Whenever the authorities of a town shall be commanded to levy and collect taxes to pay a judgment rendered against it, they may appoint a special tax-collector to collect the same. Act 1876–'77, ch. 257. But this power to appoint such a collector is additional, and does not abridge their right to require the collection to be made by the regular officer appointed for that purpose. *Webb* v. *Beaufort*, 496.

TAXES:

Appeal from board of commissioners, 56 (2).

Of towns and cities, 489 (2).

Of railroads, 519.

Tax title, 251 (2).

TENANTS IN COMMON:

1. In partition of land, equality must be had by compensation in money for the deficiency, according to the value of the land at the time of division. The right to such compensation arises out of an implied warranty attaching to each share from all the others. *Cheatham* v. *Crews*, 38.

2. When one can purchase of another, 350.

3. Sale of land for partition, 391.

TITLE:

Want of, does not prevent recovery, when, 27 (2).

At execution and judicial sale, 262 (5).

Under deed not registered, 333.

TOWNS AND CITIES:

1. Fines imposed and collected under city ordinances, are not included in the constitutional provision appropriating fines, &c., collected in the several counties to the school fund. *Com'rs* v. *Raleigh*, 120.
2. The power conferred by a town charter to pass ordinances for its local government, is in subordination to the public laws regulating the same matter for the entire state; *Therefore*, a town ordinance punishing the offence of selling liquor on Sunday, must give way to the general statute on that subject. Act 1877, ch. 38. The jurisdiction to try such offence is given to the superior court. *State* v. *Langston*, 692.
3. Repeal of charter, effect of, 489 (2).
4. Taxation by, 496.

TRANSACTION WITH PERSON DECEASED, 208 (2).

TRANSCRIPT OF RECORD, 573.

TRESPASS AND TROVER, complaint in, 27.

TRIAL:

1. Submission to the jury of a needless issue, and proof of an admitted fact, which are not seen to be prejudicial to the party excepting, are not assignable for error. *Perry* v. *Jackson*, 103.
2. The answer to an alleged improper question, not the question itself, constitutes ground of exception. *Ib.*
3. Where the verdict upon several issues submitted is inconsistent, a new trial will be ordered. *Mitchell* v. *Brown*, 156.
4. A plea in abatement, or a motion to quash, after plea of "not guilty" entered, is only allowed at the discretion of the court. *State* v. *Jones*, 671.
5. The standing aside jurors to the end of the panel, in the trial of capital felonies, where the prisoner's challenges are not exhausted before the "jurors stood aside" are tendered, is the recognized practice in this state. *Ib.*

6. Right of trial by jury or by court in equity proceedings, 108.
7. Allowing additional affidavits in certain cases, 182 (2).

TRUSTS AND TRUSTEES:

1. Where the defendant, in pursuance of a previous understanding, bought land for the joint benefit of the plaintiff and himself, the plaintiff paying a large portion of the purchase money and contributing equally to the employment of a common counsel in the management of the matter—both parties being mutually interested—and the defendant procured the deed to be made to himself alone; *Held*, that the plaintiff is entitled to an execution of the parol trust, and to that end, to have the defendant declared a trustee for his benefit. *Leggett* v. *Leggett*, 108.
2. This case is distinguishable from *Turner* v. *Eford*, 5 Jones' Eq., 106, since here, the plaintiff is not attempting to have a fraudulent contract enforced, but an agreement subsequent and wholly disconnected. *Ib.*
3. Trust to secure creditors, personal property exemption, 243. See also, 362 (4).

UNDERTAKING ON APPEAL, need not be signed by appellant, 7.

UNREGISTERED DEED, title under, 333.

USURY:

To avoid a bond on the ground of usury, it must be shown to have been illegal *ab initio;* for if good in its creation, it cannot be avoided by any subsequent usurious agreement. *Wharton* v. *Eborn*, 344.

VACATION OF JUDGMENT, against infant, 35.

VARIANCE IN PLEADING, 151, 379 (3).

VENDOR AND VENDEE:

Fraudulent deed, 256.

Equity for payment, lien, 261.

Vendee entitled to rents, 266 (2).

VESSEL, owner of, when liable in damages, 123.

WARRANT:

1. A justice's warrant for larceny, which describes the offence with sufficient precision to apprize the accused of the charge, is good, though defective in form, and will protect the officer who executes it. *State* v. *Jones*, 671.

2. But in cases determinable before a justice, the warrant is the "indictment," and must set out the facts constituting the offence with certainty. *Ib.*

3. A regular officer is bound to obey a warrant directed to him, if it is for an offence within the jurisdiction of the justice (either to bind over or try the party); and a special officer is equally protected by the law when he executes such warrant, though not bound to obey it, nor sworn as a regular officer. *Ib.*

4. The prisoner, under the circumstances of this case, is guilty of murder in slaying the officer specially appointed to execute the warrant, the same being read to the prisoner, who was also informed that the arrest was made under its authority. *Ib.*

WARRANTY:

Implied in partition of land, 38.

In sale of horse, 190.

WILLS:

1. Where a testator expresses a manifest purpose of disposing of property of another, to whom the testator devises property of his own, it is immaterial whether he believed he had title and the right to will it; or, where the testator, having an undivided interest in the property, devises it specifically; in either case, the devisee or co-owner must elect between his interest in the same and any other interest he may take under the will. *Isler* v. *Isler*, 581.

2. The probate of a will in common form and the grant of letters testamentary by the probate court, is conclusive as to the fact that there is a will and an executor thereof, so long as the adjudication of probate stands unreversed: it cannot be collaterally impeached in another court. (Cases in which the probate court acts without jurisdiction of the particular case, reviewed by SMITH, C. J.). *London* v. *Railroad*, 584.

3. Whether the letters be void or voidable, a *bona fide* payment of a debt due to the estate will be a discharge to the debtor. *Ib.*

4. The probate of a will is conclusive until revoked by a direct proceeding in the probate court for that purpose; and a certified copy thereof is competent evidence under Bat. Rev., ch. 119, § 40. *Hampton* v. *Hardin*, 592.

5. A devisee under a holograph will is a competent witness to prove the will. The disqualification of interest is removed by the act of 1866, and section 10, chapter 119 of Battle's Revisal, applies only to wills that have attesting witnesses, and to the attesting witness. *Ib.*

6. To carry out the general intention of the testator, the court supply an omitted word in the following clause of the will: "In case it should be more convenient to my beloved wife to have [sold] the land and even the negroes, the latter I suppose she ought to keep, as she will have two-thirds during widowhood and one-third in fee, she is at liberty to do so, as she will have ample money to purchase elsewhere." *Howerton* v. *Henderson*, 597.

7. A legacy to one deceased at the time the will was made, like lapsed legacies, goes to the residuary legatee, whenever it appears from the words of the will that the testator has not expressed a different intention. *Mabry* v. *Stafford*, 602.

8. The trustee of the residuary legatee is not a necessary party to an action brought by the next of kin against the executor, to recover a sum bequeathed to one deceased, though the same may have been paid to the trustee by the executor. *Ib.*

9. The testator provided "that all property, money and effects, willed by me to my wife, that may be left at her decease, shall be equally divided," &c.: *Held*, that the word "property," being associated with "money and effects" and taken in connection with other provisions of the will, has a restricted import and does not embrace the lands devised. *Brawley* v. *Collins*, 605.

WITNESS:

1. The ruling in *Mason* v. *McCormick*, 80 N. C., 244, in reference to incompetency under section 343 of the Code, in case the witness ever had an interest in the event of the action, approved. *Hampton* v. *Hardin*, 592.

2. Where a witness is ruled out as incompetent, it is not necessary to set out what it was expected to prove; but if the objection be to his competency to testify to certain definite matters, what he proposes to testify must appear, that the court may pass up it. *Ib.*

3. A party cannot contradict his own witness; where the state called and examined a witness, who was afterwards put upon the stand and

examined by the defendant, *it was held* inadmissible for the state on cross-examination to discredit him. *State* v. *Taylor*, 694.

WITNESS:

Examination of, discrediting, 103 (3, 4), 634.

Devisee competent to prove will, 592.

Before grand jury, by whom sworn, 698.

WRITS OF ERROR, abolished, 478 (4).

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